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United States. Courts: Circuit Court, 4th Circuit, Virginia

THE

TRIAL

OF

Col. Aaron Burr,

ON AN INDICTMENT FOR

TREASON,

Before the CIRCUIT COURT of the UNITED STATES, held in Richmond, (Virginia), May Term, 1807:

INCLUDING THE

ARGUMENTS AND DECISIONS

On all the Motions made during the Examination and Trial, and on the Motion for an Attachment against Gen. Wilkinson.

TAKEN IN SHORT-HAND BY T. CARPENTER.

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L. S.

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G. DENEALE, CLK.
of the District of Columbia.

Circuit Court of the United States,

MAY TERM, 1807.

At a Circuit Court of the United States, began and held in Richmond, State of Virginia, on the twenty-second day of May, in the year of our Lord, one thousand eight hundred and seven,

JOHN MARSHALL, Chief Justice of the United States,—

And CYRUS GRIFFIN, District Judge, on the Bench.

Col. AARON BURR, attended by his Council—Edmund Randolph, John Wickham, Benjamin Botts, and John Baker, Esquires, appeared in Court, and took seats at the Bar.

The Grand Inquest being called, and a sufficient number answering to their names, (previous, however, to their being sworn)

Mr. BURR addressed the Court to the following purport:

May it please the Court.

Before any further proceeding with regard to the arrangement and swearing of the Jury, I will beg leave to point out some irregularity in summoning a part of the pannel. It is my wish to take this measure at the earliest period, in order to prevent trouble at a more advanced stage of the business.

I understood that the Marshal, in making up his pannel, acts under a law of the State of Virginia, by which he is directed to summon 24 freeholders of the State to compose the Grand Jury; 16 of whom, so summoned, are to act; and that it is only in cases of emergency he can summon 25, which must be by order of the Court. Now, Sir, if it can be made to appear that an error has been committed—that the Marshal summoned 25 instead of 24 of his own accord; and it is contrary to law, it ought to be corrected. The Marshal can say who have been summoned, and at what period, which will be before the Court for their consideration.

Mr. BOTTS read the section of the law referred to by Mr. Burr. The reports and impressions which have extended from one part of America to another, renders it proper that Mr. Burr should have a regular trial, divested of every difficulty or error; and this is his earnest wish. It is his desire to begin with asking the strictest scrutiny, in so important and interesting a case, whether it be in past measures used as to the summons, or in any others which may yet come to view in the investigation. The Marshal, by the pow-

ers and duties assigned to him, acts as the material officer of the Court; which duties are designated by the laws of Virginia, and by an act of Congress which established the Court. The law of Virginia directs him to summon 24 freeholders, any 16 of whom that shall appear in Court shall form the Grand Jury. Now, when he has summoned this 24, he has done his duty: all is performed that devolves upon him.

Mr. BOTTS, in making these observations, disclaimed any imputation of guilt to the Marshal, whose disposition, character, and standing in society, bore ample testimony to render his integrity indisputable; but however intentionally correct, he might have put a misconstruction on the law by which his ministerial conduct is governed; and if such error has been committed, it is in the power of the Court to correct it, as they only have the right to order an enquiry into the returns of its own officers. Although it may be disagreeable to our feelings, yet we feel it our duty to say, that the pannel has not been made up as it ought to have been. If it shall appear that after 24 have been summoned, another is summoned to supply the vacancy occasioned by one of those before placed on the pannel, being excused, such conduct is contrary to law; for the Court only, and not the Marshal, can supply vacancies in the panhel. Certainly if the act had not been complete, and the summons regularly served, an excuse might have been taken, and another person summoned; but in the instance referred to, the act was completed, and no excuse afterwards was admissible, let the inconvenience be what it might. What would be the consequence, suppose there are not jurors euough appear? Why, the Marshal is not to fill up the pannel, but tell the Court of the deficiency, who will order it to be supplied from amongst the bye-standers. This has always been the custom of the Virginia Courts; no juror has ever been excused after a regular summons, at the will of the Marshal.

Upon this ground Mr. BOTTS said it was that they asked for enquiry. They wished the Marshal to say who were the 24 first summoned, for these alone must be the Grand Jury, wherever they might be. They asked it as a matter of right, that a purgation might take place according to law, and the case proceed in that way which alone was right.

Mr. G. HAY (District Attorney) thought the proposition of no sort of importance. He did not know whether it was strictly proper at this time to enter into the examination. It was rather a solution with him, which he was not now competent to decide (it being quite a new subject) but he should have no objection to enter into the discussion.

Mr. WICKHAM produced also authorities to prove that this was the precise period, before the Grand Jurors were sworn, to make the objection now offered, or it would be forever after too late. He read 2d Hawkin's 307, and 3d Bacon 725. He was very de

sirous that this Grand Jury should pass upon the case without a possibility of exception; and this could not be done whilst the obstacle before suggested remained undecided. Whether any more excepitons would be taken, it was not now necessary to say.

Mr. HAY. The act of assembly of Virginia had received a construction by the gentlemen, which neither sound sense nor sound policy requires. The selection of jurors is entrusted to the officers, who is insructed to summon 24 freeholders, worthy of the office. Now, Sir, suppose some of them object to serve from some domestic calamity, heavy misfortunes, or a necessity to remove to another part of the world, what is the Marshal to do? Is he to return these men as summoned? Is he to be prevented taking others in their place, and not to admit the excuse? Wherein is the propriety of the one mode, and the inconvenience of the other? The law allows him, in case of insufficiency in number, that appear in Court, to summon bye-standers; and can it prevent him filling deficiencies previous to their appearing in Court? I ask the gentlemen to satisfy me as to the fact; how that is I know not; but I am rather inclined to believe they are mistaken upon the fact adverted to. If the gentlemen think the enquiry is necessary, and the law will warrant it, I can have no objection.

Mr. WICKHAM read a quotation to this effect; "Every objection that may be taken to a juror, or the mode of summoning, that juror may be made any time before the Grand Jury is impanneled." And 3d Bacon, 725, a clause on this subject ends with these words: "But this exception must be taken before the indictment come." Now Mr. Hay supposes that this construction is most rigid; that sound policy will not admit of such an exception. But, Sir, I say the words of the law are precise, and the practice is governed by it of necessity. If we are to wander, by construction to what length may we not permit ourselves to go, and how much danger would there not be in such cases? Here is an officer appointed by the government with powers very extensive and important. May he not tamper with the government, or suffer himself to be tampered with, when circumstances might admit of favoring ambition or interest? But no: his powers are defined by statute; he is a ministerial officer bound to pursue the plain path of the statute, and according to the strict letter of it, without allowing to himself any latitude. Mr. Hay's arguments appear to treat it as a mere matter of form, supposing that the 24 are not collected, the Marshal might fill up to that number. But it is not so; he is to summon 24 men, and if less than 16 attend, he is to inform the court of it, and then to summon others to fill up the deficiency. Here the Grand Jury might have been summoned days and weeks: the Marshal thinks proper to strike out one off the pannel, (with or without excuse is immaterial as to the effect.) It is useless here to enquire consequences; they are obvious; but I enquire whether *it is law?* These observations relate to a fact. There was a very respectable gentleman who was

summoned on this Grand Jury: he made excuses from attending: well, the Marshal received the excuse, struck him off the pannel, and summoned another. Now, had this excuse been offered to the Court, the gentleman might have had his wishes complied with: but is the Marshal to sit as Judge? and that without appeal? Is he not only to displace one, but to put another in his place? Mr. W. concluded by excusing himself to the Marshal for such close reflections; he did it from a sense of duty, and with a strong impression that it was the effect of error, and from the purest motives in that very respectable officer.

Mr. HAY said he was content to leave the subject where he had supported it, to wit: upon the propriety and policy of it. He could see no possible evil to be expected from the exercise of that power, before the jurors appeared in Court. Afterwards, to be sure, it was proper that the Court should order the Marshal to fill the deficiencies, if any should appear.

The Court enquired if the question had ever come before any of the State Courts?

Mr. E. RANDOLPH. Not to my knowledge. In nearly 30 years practice in the State Court, and in another capacity part of the time, I never saw occasion for such an objection. On the question of right for us to object, there can be no doubt. We rely on strict, undeviating principle, drawn from a source, written in broad, intelligable characters. And if we allow of such a modification as the construction put by the officer, *virtuous as I know him to be*, the time may come, when men less virtuous may take advantages of such a power, and act *wrong*. If I am to assign my reasons for such an arduous desire to obtain right in this case in particular, it is this: That all those who hear me at this time, may hear me declare, *that there never was such a torrent of prejudice spread over the country, in any one case, as in the case now before the Court.*

Judge MARSHAL observed, that it was out of the power of the Marshal to summon more than 24, as the act of assembly authorized only that number: if he should summon 25, the last would not have power to act—he not being summoned—there not having been power in the officer so to do. He would not have power either to disable any one of the other to put the last in his place, because the number of 24 was already made up of those first named; any 16 of whom, according to the act, would compose a Grand Jury. But if there should not sixteen appear, then a power is given by the court to summon from the bye-standers, enough to fill the deficiency.

What was the common practice of the summoning he could not say, but was inclined to believe that the Marshal was in the practice of taking excuses after having summoned the person, under the impression that it was in his power so to do. The opinion of the Court was, that the act was complete when the 24 was summoned.

Mr. BURR asked the Court leave to prove the fact, that the Marshal had admitted excuse, and supplied such deficiency.

Major SCOTT (Marshal) acknowledged that he had summoned a person to attend who made an excuse, which was excepted, and another put in his place. Another he had summoned, who told him that he was going to leave the State. His excuse was also admitted, and *he* replaced. These things were done under the impression of a duty that he could not dispense with, of making a return of 24 persons to Court.

Mr. BURR. Were not two others originally summoned?

Marshal. There were two others originally summoned. I received their answers in writing, excusing themselves; and I summoned others in their places.

Court. Those two persons who were put in the places of those excused, are they not on the Grand Jury?

The Grand Jury was now called over. Wilson C. Nicholas and William B. Giles were summoned in the place of those who were not before regularly served; which in fact were themselves, but summoned in open Court.

Mr. BURR. I understand that we now stand upon the sixteen now mentioned, two of which are put on by the removal of other two, who were not regularly summoned. I now consider myself by right to demand the removing of two persons on that pannel by challenge, upon shewing proper cause. I await the order of the Court upon the challenge, when I shall name the persons meant. This right I claim upon the same principle as though it were a petit jury: the right of individual challenge of array upon shewing cause, in which case is indisputable.

Mr. BOTTS. The law is express in favor of the accused challenging for favor upon cause being shewn. In common law, an indictment must be found by twelve men. Now if we shew that we cannot have an examination into the case before the Grand Jury in that purity which is requisite to afford ample justice, we have a right to the challenge for favor; and the situation in which we stand, indulges the presumption that the Court will decide in our favour. When we say that such cause does exist, we mean no imputation to any gentleman's intentions.

Mr. HAY. The right is admitted. It is sound sense and sound law.

The Court admitted of the right of challenge.

Mr. BURR then proceeded to name the persons and causes of challenge. The first is William B. Giles. The cause of challenge is, first, and it being a matter of public notoriety, may be established beyond a doubt. Mr. Giles, whilst a member of the Senate of the United States, had occasion to pronounce upon certain documents of testimony, of which I was the object; and that he did so in the most emphatic manner, is a fact beyond dispute. Upon the view of those documents, and governed by that warmth with which he expressed himself upon that occasion, he actually

did vote for the suspension of the *Habeas Corpus* act; and that because he had seen some *eminent publications:* Which proves that he had ground in his opinion to suppose that there was *rebellion* in the country; and having thought so, he acted accordingly.

Further. Since Mr. Giles returned from the Senate, he has endeavored to establish that opinion which he then entertained, by pronouncing the same things which he did in his public capacity, upon what he supposed to be sufficient evidence of guilt, and a guilt of which I was the subject of his conversation. Upon these grounds, I consider just cause of challenge lies.

Mr. Botts presumed, there could be no objection to these being each a just cause of challenge. The gentleman he hoped would harbour no suspicion that it was any reflection upon his integrity to challenge him on those grounds: no reflection of the kind was meant. He presumed that the Court would accord with them in their sentiment, that there was just cause. If not, they should proceed to prove their ground; and that either of these causes was sufficient to disqualify Mr. Giles from being a juror in this case.

Mr. Hay had no objection to afford the gentlemen their wishes on this occasion. He was contented that every one should be withdrawn from the pannel who had made declarations on the case which tended to shew that he had made up his mind as to the guilt or innocence of the accused; and others put in their places, against whom there could be no objection. He was not disposed to spend days and months on such subjects as these.

Mr. Giles said, that the circumstances which had just occurred, placed him in an unpleasant situation—That he had no objection to disclose, in the usual way, with candor, the real state of his mind in relation to the accused; but, that he had an objection to the introduction of witnesses to prove casual expressions. That in the *present state of things*, expressions might be imputed to him, which he had never used; or his expressions actually used, might be mistaken or misrepresented by the witness, or the witness's own inferences from his expressions might be proved, which would not have been justified by such expressions.

Mr. G. observed, that it was by no means agreeable to him to be summoned on this Grand Jury: but for some time past, he had invariably pursued this maxim: *Neither to avoid, nor to solicit, any public appointment;* but, when called to the discharge of any public duty by the proper authority, conscientiously to attempt its execution.—That in undertaking to serve on the present Grand Jury, he was influenced by the same consideration.—That with respect to his public conduct, that he presumed was of public notority.—That he had not only voted for the suspension of the privilege of the writ of Habeas Corpus, *in certain cases*, but had proposed that measure.—That he then thought, and still thought, it was called for and justified by the evidence before the Senate; and that he now regretted that the House of Representative had not

energy enough to support the Senate in that measure.—That this opinion was formed upon the state of evidence before the Senate, which in all questions of a general nature, is of a very different character from the legal evidence necessary in judicial investigation. That his mind, he believed, was perfectly free to receive impressions from judicial evidence.—That in relation to the accused, he felt very desirous, and had often so expressed himself, that the various transactions imputed to him, should undergo a full and fair judicial investigation; and that through *that medium* they should receive their just and true character, whatever that in point of fact might be—and be presented in *that character* to the world. That he had no personal resentment towards the accused; and if the accused had received any information inconsistent with this statement, it was not true.

However, as it was left with him to *elect* whether he would serve on the Grand Jury or not, he should certainly withdraw.

Col. BURR said, he must be pardoned for supposing that this effort of the gentleman to divest himself of all prepossessions was above human nature. He believed he had, as much as any man could have under such circumstances, a pure mind, above bias. But this particular fact of having in his public character formed a decisive opinion upon his conduct, must render him unqualified to serve upon the jury. He declared that Mr. Giles was the last man on whom he would wish to cast any reflections.

The second gentleman to whom I shall object, is Col. Wilson Cary Nicholas. That gentleman feels towards me a personal enmity sufficienty strong, I presume, to blind the judgment of the wisest of men.

Col. WILSON C. NICHOLAS rose, and addressed the Court as follows:

My being in this situation, certainly was not a thing of choice. When I was summoned by the Marshal, I urged him, in the strongest manner, to excuse me. I mentioned to him, that it would be extremely inconvenient to me to attend the Court, and that it would be very unpleasant to serve on the jury, on account of the various relations in which I had stood to Col. Burr. I had been in Congress at the time when the attempt was made to elect Col. Burr President of the United States. My feelings and opinions on that occasion were well known. I had served three years in the Senate while Col. Burr was President of that body, and was one of those who, previous to the last election, had taken a very decided part in favor of the nomination of the present Vice President, for the office at that time filled by Col. Burr. Moreover, from the time Col. Burr first went to the Western country, my suspicions were very much excited, as to his probable objects in that part of the United States; in consequence of which, I gave early, and perhaps too great credit, to the charges which were brought against him. Such was my opinion of the

importance of New-Orleans, not only to the prosperity, but to the union of the States, that I had felt uncommon anxiety at what I believed to be the state of our affairs in the west, and had expressed my impressions very freely in conversation, and in letters to my friends, during the last winter. Under these circumstances, I doubted the propriety of my being put on the jury; but I feel no *distrust of myself*, as I was confident that I could discharge the duty, under a just impression of what I owe to my country, to the accused, and to my own character. The Marshal assured me that he felt the strongest disposition to oblige me, but that he did not think he could do it, consistently with his duty. He supposed there was scarcely a man to be found, who had not formed and expressed opinions about Col. Burr: that he too was in a situation of great delicacy and responsibility, and that without the utmost circumspection on his part, he should be exposed to censure. I renewed my applications to the Marshal several times, and always received the same answer. Thus situated, I determined to attend the Court, both from a sense of duty, and because I would not put it in the power of the malicious, and those disposed to slander me, to assign montives for my absenting myself, which had no kind of influence on me. Another reason for pursuing this course, presented itself some time after I had formed this determination. I conceived that an attempt had been made to deter me from attending this Court. I was informed by a friend in this city, that he had heard that one of the most severe pieces which had ever been seen, was preparing for publication, if I did attend and serve on the Grand Jury. From what quarter this attack was to come, I did not know. The only influence which this circumstance had, was, to comfirm me in the determination I had made; as I was much more inclinced to defy my enemies, than to ask their mercy or forbearance. From the first I hesitated, whether I ought not to make the same representation to the Court, that I had made to the Marshal. As I was in doubt on the subject, before I came from home, I committed to paper the substance of what I have now said, and consulted three gentlemen who were lawyers, men of honor, and my personal friends. Their advice to me was, not to mention it, for they did not believe that the Court would, or ought to discharge me for the reasons I had mentioned. As I was in doubt myself, I determined to follow their advice; and the more readily, as they seemed confident that I would not be discharged; and I was not ambitious of acquiring, in this way, a reputation for scrupulous delicacy. I was perfectly willing that my reputation should rest upon the general tenor of my life, and did not believe my character required such a prop. At present, I feel myself embarrassed how to act. I certainly was, and am, anxious not to serve on the jury; but I am unwilling to *withdraw*, lest it should be thought that I shrink from the discharge of a public duty of great responsibity; and I am not willing to be driven from the discharge of that duty, in a way which should lead to a belief, that the objection made to

me is either acknowledged to be well founded, or has been sustained by the Court. Upon this subject the example of Mr. Giles has great weight with me. That consideration, and a hope that my motives cannot now be misunderstood, or misrepresented, will induce me to do as he has done.

Col. BURR. The circumstance mentioned by the gentleman, that an attempt has been made to intimidate him, must have been a contrivance of some of my enemies, for the purpose of increasing the public prejudice against me; since it was calculated to throw a suspicion on my cause. Such an act was never sanctioned by me, nor by any of my friends. I view it with indignation, and disclaim any knowledge of the fact in question.

When either of the Jurors appeared desirous of expressing their feelings or former impressions, the Court put the following questions: Have you made up your mind upon the case of Mr. Burr from the evidence you have seen in the papers or elsewhere? Have you declared your opinion, for or against, on this case? Upon these questions being asked *Mr. Joseph Eggleston*, he replied: In consequence of being summoned by the Marshal as a Grand Juror to this Court, I wrote a letter to that officer, desiring him to excuse me from serving, my own private affairs urging me; and besides, I stated that after having read the deposition of Gen. Eaton respecting Mr. Burr, I felt my mind so warm, that it would not be proper for me to attend as a Juror. The Marshal answered, that he could not excuse me on that ground, for he supposed every person must possess the same impressions, and he could not take that excuse.

On the Court asking him if he had expressed his opinions on this particular case, Mr. E. answered, that having formed the opinion above stated, he spoke it in public companies; and these were his impressions from what he had then read; but what he had since read on the case had left him so far relieved of prejudice, as not to be able what to say. However, he begged the Court to excuse him.

Judge MARSHAL said he did not believe there could be a person found, who had not received impressions from what he had seen, and therefore this could not be an excuse from serving.

Mr. BURR. Unfortunately it is a fact. Industry and malevolence which have pervaded the whole country, leave me but *little, very little* chance of an impartial jury. It is true, I know not the precise fact; but I think it cannot be doubted, that (probably) a majority upon that pannel have formed impressions unfavourable to me. I cannot have a better reason that the gentleman should be excused, than that he wishes himself to be excused: and *because he thinks his mind is not free upon the case.* The candour of the gentleman cleanses him from any imputation of a wish to injure. The Court will warn that Jury against particular prejudice; and if they find any harboured within the breast of any one, they will not hesitate to point it out.

Court to Mr. *Eggleston.* Have you now, Sir, an opinion formed on this case?

Mr. EGGLESTON. I must say, that if no other information should come to my view, it may be said, I have not: but having expressed myself as I have, may convey an impression to the public, and perhaps may rest a little in my own mind as a sort of bias. I consider myself as pure as these circumstances will admit of, yet I wish to be excused.

The Court did not excuse this Juror.

Mr. JOHN RANDOLPH was then called by the Marshal as a bystander, in order to complete the legal number of Grand Jurors, upon which he addressed the Court as follows:

I hope to be excused—I have formed, not upon the case now before the Court, because I do not know what that case is—but I have formed an opinion concerning the nature and tendency of certain transactions imputed to the gentleman now before me. I do trust, that, without arrogating to myself any thing more than becomes a man, I could divest myself of this impression, upon evidence. But I should be wanting in respect to the Court, and to the party prosecuted, if I did not state that I have strong prepossessions.

Mr. WICKHAM. It would be difficult to find a man in Court who could not say as much.

Court. Did you declare that opinion.

RANDOLPH. I never did on the case.

Court. It is not an exception.

Doctor FOUSHEE then came forward, and declared that his opinion was formed on the case, so far as the newspaper testimony he had seen could go. However, much testimony might yet come out, which, as yet, was unseen by him. If what he had seen or heard was true, he had made up his opinion. If asked to speak positively on the subject, he must first ask, what testimony, or if any new testimony was to be exhibited to the Grand Jury. If the testimony which he had seen, however, should be supported, then he should think as unfavorable of the case as any other person.

Considerable conversation here took place between the Council on both sides, and Mr. Burr. The witness was excepted.

The Grand Jury were then sworn, and were as follows:

John Randolph, jun.—Foreman;
Joseph Eggleston,
Robert Taylor,
Littleton W. Tazewell,
James Pleasants,
Joseph C. Cabell,
John Brokenbrough,
William Daniel,
James M. Garnett,
John Mercer,
Edward Pegram,
Munford Beverly,
John Ambler,
Thomas Harrison,
Alexander Sheppard,
James Barber.

Judge MARSHAL then delivered an appropriate charge to the Grand Jury, who retired to their room.

Mr. BURR rose to express his wish that the Court would

give some farther instruction to the Grand Jury than appeared to have been given in the charge.

Mr. HAY objected, concluding by saying, that no other person than Mr. Burr *would dare* to ask so unprecedented a thing; and why should *he* calculate upon a deviation from the perpetual rule.

Messrs. E. RANDOLPH, WICKHAM and BOTTS contended, that it was proper the Grand Jury should have the law on the doctrine of Treason explained to them—what kind of evidence it required—that two witnesses were necessary to prove the overt act, &c.—that the decisions of a Grand Jury, ought as much to be governed by established principles of law and constitution as a Petit Jury. They hoped the Court would give instruction to them accordingly. It was not Mr. Burr's wish to obtain a privilege which would be denied to others.

Mr. HAY answered, that he knew not what could be expected to be obtained from such instruction. The Court had heretofore only charged the Jury in general terms upon such subjects as would be cognizable by them: they no doubt would receive instruction on all points of law from the Court, at any time they should find it necessary to ask. Besides, they would possess law books on the subjects that may be committed to them, and every other species of information necessary.

Judge MARSHAL, said, there would certainly appear to be some propriety in the request, if it were not in the power and disposition of the Court to instruct them in all the researches which they might wish to make. That all the testimony should appear before a Grand Jury which tended to an accusation, was true; but he was not perfectly satisfied that it was necessary to instruct a Grand Jury to require the evidence of two witnesses to the overt act, before they could return a true bill for Treason, as must be the case with a Petit Jury before they can give a true virdict. Of this he would enquire, and if it should be so, he certainly would not withhold such instruction. On every point whatever, he was desirous of giving all the instruction which he possessed.

Mr. HAY would not yet say that a bill for Treason would at all be presented to the Grand Jury; but the gentlemen engaged, might rest themselves perfectly satisfied that nothing should go up to the Grand Jury without being first submitted to them; for there should be not the least advantage taken in the examination of the case.

The names of several witnesses summoned in behalf of the United States were then called over; of whom the following appeared, and were recognized in the sum of one thousand dollars each, conditioned for their attendance on the next day at 11 o'clock.

Edward W. Tupper, Julian Dupeistre, Paul Henry Mallet Prevost, James Miller, Thomas Truxton, Samuel Scoutin, Benjamin Stoddart, Nicholas Perkins, George Harris, Cyrus Jones, Simon Poole, Dudley Woodbridge, Jacob Allbright, Peter Taylor, Charles Willie, David C. Wallace, and Edmond B. Dana.

SATURDAY, May 23d.

Present—the same Judges as on yesterday.

The following witnesses appeared in behalf of the United States, and were bound in a recognizance of one thousand dollars each, for their attendance on the Court.

John G. Henderson, Alexander Henderson, Eric Bollman, Samuel Swartwout, Robert Spence, William Eaton, John Morgan, George Morgan, and Thomas Morgan.

The names of the following persons, summoned as witnesses on the part of the United States, were called, but they did not appear.

Ambrose Smith, Hugh Phelps, James Read, William Duane, Leonore Dovaine, Thomas Peterkin, Elias Glover, Samuel Fairlamb, James Lowry Donaldson, William Wilson, and William C. Meade.

The Counsel for Col. Burr observed, that, if it was the pleasure of the Court, the discussion intended for this day on the propriety of giving special instructions to the Grand Jury, would take place on Monday.

This proposition was assented to.

The Grand Jury appearing pursuant to adjournment, the Chief Justice informed them that the absence of a witness deemed important by the Counsel for the United States, and the uncertainty of his arrival at any particular period, made it necessary that they should be adjourned. They were accordingly adjourned till Monday.

MONDAY, May 25th.

Mr. HAY proposed to the Court to adjourn the Grand Jury until Monday next, in consequence of the absence of Gen. Wilkinson; who, there was reason to expect, would arrive by that day. The Court acquiesced.

This motion gave rise to some conversation on the nature of the evidence to be expected from that witness: Whereupon,

Mr. HAY moved, that the Court proceed to hear witnesses for the commitment of Aaron Burr for high Treason against the U. States.

Mr. BOTTS. We have cause to regret that the Attorney of the United States has not given us some previous intimation of this motion, which we had some reason to expect. We expected it, because we believed that there was to be a mutual understanding upon *every* motion which would be made relative to the case. But this is a motion so unexpected by us, and so unusual in its effects, that we are taken by surprize, inasmuch as that we did not suppose it could proceed from an officer of the United States so high and so candid as the gentleman who has now proposed it; especially as there appeared to be such an interchange of sentiments, and such mutual wishes to promote a reciprocity of understanding.

Mr. HAY. If the gentlemen thinks it is taking them by surprize, I shall wave the motion for the present, in order to give them time to prepare for it.

Mr. Botts. Not a moment's postponement. We could have been better prepared by having, what we may term, due notice; but we shall sustain a greater inconvenience by delay, which we deprecate as a loss of time. We are willing to proceed; we want no delay; we are prepared to meet the case in every shape; but it appears to be the object of the gentleman to prevent investigation, and that at the moment we are willing to proceed in the case.

But your Honors will observe the scope of this motion. The oath of a Grand Jury is, to enquire into the existence of all species of offence, and Treason amongst the rest, within the district. Their office is to perform the very duty which the Court is now called upon to perform! A body selected by the system of jurisprudence of our country to take this, or such cases, peculiarly to themselves, is now to be decided upon by a Court! I admit the truth of the doctrine, that when no Court is in session, and when no Grand Jury are assembled—that then a Judge or Justice who can commit, may commit to prison, for treason or any other crime; but it is, because a superior tribunal cannot be convened. It is an evil which the law officer is constrained to submit to, only in necessity, because nothing but necessity would render it justifiable. But are we not to consider that when a law officer is called upon to commit a person for a crime; he is also, or he certainly will, anticipate the ultimate decision? Yes, Sir; when he first passes upon the question, he has some of governing principles in his view. And will it be said that this is not a subject of the very first importance, that a Court of justice should take the bench with a mind as pure and unspotted as though the case had never been heard of before? Yes, Sir; this position has never, and never can be denied. Enough has been said to satisfy the Court, that a committing Magistrate ought not to be found in the person of a Judge, but from the necessity of the case.

I did expect, said Mr. Botts, to have heard some solitary reason given to furnish at least a pretext for such a motion as this. I did expect that resort would have been made to precepts, and that some old English law-books would have been brought forward to justify so uncommon a measure. I did suppose that resort would be had to our State practice, to give the motion a feasible face at least. But if we even take it for granted that there is a concurrence of powers between a Judge and a Grand Jury, we are at a loss to find where this power is given to a Judge or Court, sitting as this Court does. Sir, I will venture to say it is without precedent. It is unreasonable; it is inconvenient in all its operations, and most oppressive in its end. It is of a piece, I will say, in its galling oppression, with what the unfortunate accused has been suffering for a long time past.

Mr. Burr appears in this Court, ready to go on with his trial; he is ready to meet it; he does not sue a delay, nor does he wish it. His great object is, to obtain a speedy trial; to satisfy the call of his country; and to satisfy their prejudice. Nay, he was even desirous of satisfying his persecutors; but he wishes them

not to infringe on his rights. And how, Sir, was he treated? We had, on our part intended to have put ourselves to any and every inconvenience, consistent with our interest; to await the time of the public prosecutor; (unless he should be very unreasonable,) and to evince every spirit of accomodation. But after all this, what are we told? After *months* have passed over—witnesses brought far and near—a Grand Jury attending in their room—every thing ready for trial on our parts, and ought to be on the part of the government—what are we told? Why, we do not want a Grand Jury to proceed on this business—we do not wish the ordinary course—we want the opinion of the Court, and its arm for commitment—and failing in that, we will take our other chance with the Grand Jury!

Sir, we have made enough sacrifices; we have submitted to enormous oppressions. We now demand the legal road to retribution, or at least justice. Have we not been subject to military discipline? Have we not experienced the weight of the most arbitrary stretch of power ever exhibited in this country? Under the oppressive satellites of that power, have we not been dragged about in an unprecedented manner? Yes, Sir; and now what to do we ask? We ask a legal trial. And here I will advert to one single circumstance for a solitary moment, and say (with truth too) that if we could have had every legal advantage which our case would admit of, we should have had our motion in precedence to the one now offered. This motion would have been, *to discharge Mr. Burr from his recognizance.* Mr. Burr was to appear here under his recognizance, to answer for a misdemeanor said to have been committed against the United States. He appeared, and is now present to answer to that recognizance. Mr. Burr being here to answer, he now has a right to be discharged from the recognizance, because he has satisfied the public mind by his appearance; and because, in cases of misdemeanor, our State laws provide another mode, which is, to immediately issue a summons. Upon a former occasion the Attorney of the United States argued that a summons ought to issue in such cases, and a *capias* ought not; because bail was incompatible with a summons, and the case did not require bail. This was one of the articles of impeachment against Judge Chase, because he would not grant a summons, but issued a *capias*, in the case of Callender. It was argued by Mr. Hay, that if the State laws did not furnish a rule, there could be no rule had. The result is known.

I have said this is a new case, and that if the motion should be granted, it would add to those already too multiplied and grievous oppressions which Mr. Burr has experienced. And shall it be asked of you, Sir, to add your weight to those oppressions by which he must be crushed down at once?

But there is another, and a great evil attending on such a motion as this. There can be no apprehension of any evil influence it will have on your Honours' minds. But it is impossible that the examination can be carried on without reaching the public ear,

which may operate to influence any future investigation. Thus an important purpose at least will be served by this measure:—to invest the public mind with an additional prejudice, and create an increase of public clamour, instead of an alleviation. But I trust the Court will see the inevitable evils resulting from such a measure—a measure which must divest the Grand Jury of their right of the original investigation into all matters of a criminal nature; and which will invest in the Court a matter which will be as inconvenient as improper, to the delay of that justice which we ask. Whatever may be the event, I must declare it to be a most mischievous proceeding, and it ought not to be attended to.

Mr. HAY. Really I did not suppose that any gentleman could entertain a doubt of the power of the Court to commit. The whole tenor of the argument of the gentleman just sat down, went to shew the impropriety of committing Aaron Burr. I think that the only proper question that now can arise, is, whether the evidence which may come before the Court, shall be sufficient to commit for treason. When the gentlemen shall have gone through their argument, we shall then endeavour to prove by evidence, that there is legal and good ground for our motion.

Mr. WICKHAM was rather surprised at being taken so unawares, when he apprehended there was a distinct understanding, expressed in the presence of the Court, that if any specific motion was intended to be made, it should first be submitted to the other Counsel, so that they may be prepared to meet it. Now, Sir, if I have not forgotten every principle of law that I ever learned, this motion cannot take place.

Mr. HAY here explained. I did promise to give information of the time at which I should present a Bill to the Grand Jury, but not of any motion that I intended to make. I must now confess that I did not choose to give notice of this motion. I hope the gentlemen will not attribute my motion to malice or any other evil disposition—it is no such thing—it grows from the nature of the case itself. The fact is, that General Wilkinson is known by every body to be a material witness in this case: his arrival in this country is a matter of uncertainty: it might be a long time: it might be soon that he would reach this spot. The accused knows, and his Counsel know, that should General Wilkinson arrive, we should try for High Treason; and Mr. Burr might know of the arrival or landing of the witness as soon as we may. Well, Sir, in what situation would the United States be placed in? He would have it in his power (I don't say that he would embrace it, but it would be in his power) to effect an escape, by merely paying the recognizance.

Mr. WICKHAM knew the gentleman too well to suppose that he would prevaricate, and therefore he could only say that he had misunderstood him. As to Mr. Burr's attending at this time, he could not but conceive it some matter of mortification to his enemies (he did not mean that gentleman, but the enemies of Mr.

Burr) to find him here, contrary to their expectations, ready to face every accusation. Mr. W. was surprised that the Counsel on the other side had not opened his case, nor supported his motion by any argument, as was to be desired; but, perpaps, he might not have found it necessary. But he trusted Mr. Hay would not keep back his argument, till, on their side, they had exhausted theirs, for the purpose of answering. He hoped the gentleman would be so good as to proceed.

Mr. HAY. I shall proceed then with an examination of the evidence. I do not consider the case in precisely the same view as Mr. Wickham does: he has spoken in high and lofty terms. Now, I presume, that, before the close of the trial, those terms will be changed. I call upon the Court, in the name of the United States, to commit a man, who stands in their presence, on a charge, which I offer to substantiate, of High Treason. I offer to produce witnesses to prove my allegation; but what may be the difference of the testimony before this Court, and before a Grand Jury, I pretend not to say; but I will say that this Court has the right to hear, and the right to commit, if the evidence is sufficient.

Judge MARSHAL. The case appears to me to stand thus:—The Attorney of the United States moves for a commitment, upon evidence which he says will be sufficient. The Counsel on the other side move, not to hear the motion on the part of the U. States, while there is a Grand Jury in existence, whose cognizance they suppose it proper to be, to hear testimony preparatory to a Bill.—Now the question appears to the Court to be—Will the Court hear the testimony or not, in order for a commitment for Treason to succeed, if ground of commitment should appear?

Mr. WICKHAM. Suppose the Attorney of the U. States had succeeded in his question before your Honors, and had got Mr. Burr committed for treason; I say, that, according to the practice of this Court, we might have come forward now, if he was not ready for trial, and have demanded bail to be given. This is agreeable to the judicial code of Virginia (which he referred to and read, wherein it speaks of a prisoner who has been committed for an offence, and the opponent party are not ready to try at the first term, he then might come forward and demand bail to be taken.) The ground upon which I mean to support this motion is, upon the law and upon precedent. When we stated our objections to the pannel of Grand Jurors the other day, the Counsel opposing us, said, that he never had heard of such a thing. Now, Sir, we came forward to support a principle, and we did support it. We will proceed upon law and precedent. The gentleman has not referred us to one act of Assembly. I presume if he goes upon any thing, it must be common law. I presume the experience and law-knowledge of every man in the country must be in our favour. Where is a precedent like the motion of the gentleman? If it be not to be had here, is it to be had in English record? It may be somewhere—I will rather ask, is it any where? May I not say then, that

such a motion as this is out of order, if no precedent or rule can be found? The Grand Jury are impannelled, and they are the proper medium through which an examination into the case can come into Court.

One witness, Mr. Hay says, he has not examined; which one he relies on, and which is General Wilkinson. It is said that Wilkinson, with the other witnesses in Court, would be sufficient to prove the Treason. I may refer to one of your Honors; I may refer to the narrative of the proceedings of the Supreme Court, who examined the depositions when the charge of Treason was in view; and, if we may trust the report of those proceedings, it was the general opinion, that no Treason could be discovered from the affidavits, because the depositions of General Wilkinson, and Mr. Eaton were of a different nature. The sole reliance was placed on Wilkinson's deposition: it was the opinion of the Judges that there was no Treason, but that it related to misdemeanor. Now, if Mr. Wilkinson is so material a witness as to stop the business of the Court for want of him, why is he not here? Who is he? An high military officer: blind to the will of his superiors—an instrument of the government. And this General Wilkinson could not be here! Why not? If we look to Europe for these ten or fifteen years past, we shall find many a General of the army has marched a greater distance than this, in much less time. We find General Wilkinson to be an officer of the government; a man whom the government can order to do this, that, or the other; he must do what they please to order him. Then why is he not here? It was in their power to have brought him here. I presume the gentleman is not prepared to give a reason.

But, Sir, I would ask, what will be the tendency of this application of Mr. Hay's? As to what is the motive, I will not pretend to enquire into: a private motive of the government no doubt, as the government must have a reason for their actions. The Court will know, the Counsel will know, that attempts have been made by some busy, evil-minded people, (I trust the government could not take measures of the kind on any account whatever) since the prosecution has been commenced, in this town, to influence public opinion. I do not charge the gentleman, nor do I charge the government; but some people have been busy: very probably with a view to do right. These attempts have been made through the medium of the press, to excite strong prejudices against Mr. Burr. Yet, Sir, whether these things are true or false, any attempt made to influence the public opinion, before the case is come before a Court in a fair, legal way, is prejudicated, and ought to be abhorred by every good man. It is taking up a cause on one side against the accused. Seeing these things do exist, ought not, and will not the Court bar the door as much as possble, until it is brought properly before a Jury, and then decided—not by floating rumours, but by sworn evidence, meeting the accused face to face.

The gentleman offers to bring forward his witnesses. What shall we do by that? He will select those which will most serve his cause; and others, less to his service, he will not call upon. Thus will there be a garbled account of the transactions served up, without any opposite testimony to procure the truth, or to justify ourselves against supposed faults. Ought this to be done, Sir? Is there a solitary instance of such a course being taken? Are there not peculiar and strong reasons in this case for avoiding it? But, says the other Counsel, bring your witnesses, and let us go into the case. Sir, we are prepared for this; but we are not inclined to take the course prescribed by them, because it will not bring the case to a point. For what purpose, then, should we join issue with them? Certainly for no good reason, and to no good purpose. I do not believe they have any improper motive in doing this; but the effect will be exactly the same on the case, as though they had the worst of motives concealed under their apparently fair process. It will, or may have this effect. If, in any future time, the government should single out an individual, who may be an obstacle in the way of its views; it uses military force to obtain that individual; and procures, by these unlawful means, all his property; and determines, by all means, to wreak its powerful vengeance against him—I would ask, Sir, what more effectual steps they could take to complete the downfal of such a one, than those which have been taken, and which now are proposed to be taken with Mr. Burr? What have we to do with motives, when the effects are so evidently the same?

Mr. Burr is here, ready to meet any charge. The Counsel admit that they are not ready to go before a Grand Jury on a charge of Treason, which they wish to substantiate. With their whole phalanx of power, and their host of witnesses, drawn purposely from the most distant parts of the United States, they are yet not ready! Their testimony is not sufficient! Sir, they appear to wish to keep this proceeding alive. For this purpose, great activity has been used: I know not by whom, but such has been the case. Seeing this will be the natural effect; seeing it is unusual and unprecedented; and seeing it is oppressive in its consequences, I must ask the other Counsel, why they will press a motion of this kind? But, Sir, if they will press it, I trust the Court will stand between the innocent and his pursuers; for every man is supposed to be innocent, until he is proved to be guilty.

Mr. Wirt, Assistant to Mr. Hay, (Attorney for the United States), rose. The Attorney for the United States, being confident that he possesses sufficient evidence to justify the commitment of Aaron Burr, demands of this Honorable Court, that evidence should be heard, for the purpose of procuring that commitment for Treason. The Counsel for the Defendant, believing that there is a greater propriety in sending a Bill to the Grand Jury, oppose that motion, by wishing to suspend the power of the Court to decide. In support of this wish of their's, you have heard but very

little argument; but you have heard a great deal of declamation. The gentlemen appeared to be so extremely anxious to go into the case, as to complain of the motion being made without their knowledge; a motion not calculated for their information until it should be made in Court; and even to wave the offer made to them of postponement until to-morrow, and to insist upon the argument now; though they pretend that, by taking them unawares, they could not meet it to advantage. Mr. Botts has stated to you, that this motion divests the Grand Jury of their constitutional power to enquire into the case, and places that examination with the Court, where it ought not to be, until it shall come before a Jury. I must ask the gentleman where is the power of the Court? In what does it consist? Does it not extend to commitment for trial? How can he say that it divests the Grand Jury of their power, by placing it, in its present insipient state, in the hands of the Court? The Court have the power interwoven with their constitution.—The Court say, they have this power, because they have exercised it. But the gentlemen say no; they have not now, because there is a Grand Jury impanneled! Since the gentlemen are so fond of enquiring for books and precedents, I will take the liberty to enquire—Where is the book, where the precedent, which divests the Court of this power, or transfers it elsewhere? If their doctrine be true, I will venture to say it will extend much farther than any one would be willing to admit: it would extend to all cases, and give original jurisdiction to the Grand Jury, whilst it left the Court to await the issue of all their proceedings. Suppose a motion should be made, at any time while the Grand Jury is in existence, to commit for High Treason, can it be supposed that the Court is divested of its power, merely because there is a Grand Jury in existence? What would the consequenee be, but that Aaron Burr would be discharged. Then, Sir, if we are to follow the gentlemen, and take intentions along with actions, we must conclude that they intend to discharge Aaron Burr without trial, if they can.

Since there is a difference of opinion, which is the proper tribunal of examination, the Grand Jury or the Court, it will be well to ask, whether the same evidence will operate with the one to find a bill of indictment, and with the other to commit? What was the gentleman's ideas on Friday? Why, that the Grand Jury should be charged not to file a bill of indictment without having the same evidence as would be sufficient for a Petit Jury to give a verdict upon. But can this be precisely the case as to commitment? No, Sir; suppose a man to have been brought here under custody five days ago, and no evidence at all shall appear to support any charge against him; and suppose, agreeable to the gentleman's doctrine, the case must go to the Grand Jury, without, as well as with evidence, what could the Grand Jury do with the case? Where would be the chance of justice? How could enquiry be substantiated in such a way? And on the other hand, could vicious men wish a better way than this to

escape, if their case must be examined by a Grand Jury, before the evidence is ready to prove their guilt?

I contend then, that it is not any encroachment upon the constitutional powers of the Grand Jury; for there is no collision of powers, and there can be no safety in any other mode, than that which we contend for, and which is right.

But we are told, that there is a great inconvenience in evidence going before the same great law officer who commits, that will afterwards be called upon to judge, because he may have anticipated the event. Sir, if it is wrong that a Judge should receive such evidence, lest it might bias him, the error extends farther than the present instance. The argument is entirely of a legislative nature, and not of a judicial. If it proves any thing, it must prove that the evil is beyond our reach, if an evil at all; and the inconvenience, if any, must be suffered.

Mr. Botts talks much about the shifting of powers. I contend it is no shifting of powers, because it properly and constitutionally belongs to the Court. Where can be the possible error in this jurisdiction? It is the most natural and just.

The gentleman made use of some expressions respecting the measures pursued by the government, and made some observations on a great military officer. Now, Sir, if there are faults in that military officer, and if the government have been privy to these faults, or were concerned in any thing wrong, why is it not disclosed? Why do the gentlemen shrink from the developement? Why does not the accused bring forward evidence with the avidity of an innocent man, and fix the guilt in its proper place? Why not prove to the public his innocence, if the power is in his own hands? Why not contradict the opinions which have been so universally formed of him, and not talk of volumes of abuse; governmental influence; unheard of persecution; and the like? We want the developement: it is probably in their power to give it to us: Why then do they withhold it, and foster that suspicion of which they complain?

The gentleman quoted a law, with a desire to prove that we were not ready for trial: we, at least, must admit of bail. But, Sir, that law is not relevent to the case. The law intends that when a person is committed to prison, he has a right on the first day of the term to come into Court and demand trial; when, if his prosecutor is not ready, he has a right to demand that bail shall be taken. But, is Aaron Burr committed? Is this not a motion to commit him? No inference can be drawn from this law to the present case at all.

He farther asks, if Gen. Wilkinson is a material witness, why is he not here? This blind instrument of the government, bound to obedience, why is he not here? Not that the gentlemen, any of them, mean to say any thing of evil intentions in the government: No; they may be perfectly innocent; but why do they not do this, that, or the other? Sir, I shall not attempt to answer for the pro-

ceedings of the government of the United States; it requires not my feeble aid; its measures require not my defence; nor shall I answer for General Wilkinson farther than to say, that he will be brought before his country; he will be examined with that scrutiny which his case demands; and, I believe, he will not be ashamed to meet the scrutiny. As to General Wilkinson's not being here, I will barely observe, that he is at the head of an army, which he is bound to remain with at some post, until otherwise ordered by his government. He is probably at New Orleans, which is 16 or 1700 miles from this place. It is almost impossible that he could have come here since the notice he might have received by virtue of the examination of Mr. Burr in this city. There has not been time for his arrival here, upon a moderate calculation. We are asked if General Wilkinson is a material witness? We confess that he is; but here we are told that we wish not to go before a Jury without him; we admit that we have not evidence enough to sustain a Bill, and the like. But, Sir, does this inference follow? Is there nothing in the character and conduct of that gentleman, which, for his own sake, and for the sake of the public, it is necessary to examine into? Is it proper that after the United States' Attorney is aware of the weight of General Wilkinson's evidence, he should withhold it? The Grand Jury must be aware of all these circumstances; and, doubtless, they have a desire to possess all the evidence of these circumstances that it is possible to procure. What might be the weight of Mr. Wilkinson's testimony, connected with Mr. Eaton's, may be supposed; but what might be the weight of his testimony connected with the mass of evidence which will be produced to this Court, is another thing. Although the key may have been wanting before, that is no argument that it is wanting now.

Mr. HAY. I stand here, before this Court, engaged in a very serious duty. The character of our government, and the situation of all the United States, however, requires that it should be executed. I come here for the purpose of charging Aaron Burr with Treason against the United States. On so solemn a charge as this, was it not natural to suppose, that it would have made the strongest possible impression upon the mind of the accused; and that he would employ the whole force of his understanding, and all the ability of his learned Counsel, to vindicate himself from such a serious charge, instead of wasting his time in useless recriminations and invective. Why do we hear the Defendant and his Counsel, at this time, talking about the persecutions he has experienced? Why not rather vindicate himself from the imputation of guilt, and remove those impressions which the public mind bears? But, Sir, I deny that he has suffered or experienced persecution at all. There is not a tittle of evidence of any persecution he has suffered; and, therefore, we must call it mere declamation, when we hear of such a thing. And I will venture to say,

that not a tittle of evidence of that nature can be produced, unless this can be construed into persecution—that the government of his country attempted to bring him to a legal trial, to answer for the crimes which he has committed: crimes, not only tending to involve this country into the horrors of war with another power, with whom the country is at peace—but, tending to involve the United States in all the increased horrors of a civil war, to the destruction of every thing which can render man happy. Is this the persecution of which he complains, when brought before a solemn tribunal of justice; instead of meeting the serious charge, and warding off its weight? He exclaims, that he is persecuted! And what is that persecution? Why, Sir, because he was sent by a military force from the place where he was arrested, to this place! Well, what was to be done? Could he be tried where he was arrested? No. Well, if he was to be sent to the district where the crime was committed, how was he to be sent? By a single man? By one or two, from whose hands he could have easily been rescued? No, Sir; he was escorted by a force sufficiently strong to secure his delivery at this place: And he complains of persecution. Of the humanity of Mr. Perkins, or of his attention, Mr. Burr could find no fault.

But, Sir, the Counsel for Mr. Burr, not contented with complaining of the persecution suffered by him from the government, (a government that never will persecute; it is incapable of persecuting; it has no occasion of such props: the integrity, intelligence and moderation with which its affairs are administered are sufficient to claim confidence) descends from the government down to the humble officers employed by them, and talks of their persecution. How is this? Why, say they, a motion has been made which was never agitated before in this State! Then they complain that we did not apprize them of our motion. Why, Sir, if we had, Mr. Burr would have been apprized of it. Well, suppose he had been disposed to go away; (I do not know that he would be so inclined, but it is impossible for me to say what passes in his heart) suppose I had been possessed of that candour of which the gentleman speaks, and he had gone away, should I not have been guilty of a gross violation of my duty, and of the trust reposed in me as public prosecutor? I did not make the communication, because I thought it to be incompatible with my duty. But, say the gentlemen, "this Court ought not to commit Mr. Burr; no matter whether you can, or think that you can proceed with your prosecution or not; yet, as there is a Grand Jury now in existence, the power of the Court is altered so as that it belongs to them to examine the evidence, and not to the Court!" I want to know where this doctrine came from? I did not examine any books on the subject, to be sure, to establish the point, because I did not think it possible to find a single man within the bar of this Court, that could seriously say, that a Court of Justice, before whom a man stands charged with Treason against his country, was

incompetent to examine into the probable cause of that allegation; because, and merely because there was a Grand Jury sitting! I shall quote some expressions of the gentlemen, as they have quoted some of mine. They say, that the evidence which will be brought before the Court, if my motion takes place, must be much greater that would go before a Grand Jury, and nearly equal to what would be required by a Petit Jury. How then, can they, in any respect, controvert it? If all the facts are to be seen, why may they not be brought into view at once? But I candidly declare, that this is not an admissible position. I think there is no difference whatever as to amount of evidence that ought to be examined, whether it be by the Grand Jury or by the Court; with the exception however of the affidavits, of which I am not certain. Here we can produce the affidavits of those witnesses, whose persons cannot be procured; but I do not know that I could send them to the Grand Jury; and if I should, I do not know the consequence. The evidence we have now before us, is, in my opinion, perfectly sufficient to warrant a commitment: nay, I think that the *viva voce* evidence is sufficient to find a true Bill. But would it be honest? Would it not be proper that I should get all the evidence that I can? I do not know what the gentlemen on the other side think, nor do I care; I will act agreeable to the dictates of my own conscience; and, when I have acquitted myself thus, it is of no consequence to me, whether ten, or ten thousand approves, or disapproves.

Gentlemen are asking for my precedents; I should give them my precedents. Sir, I am not very fond of being eternally led by precedents. Precedents may be useful in some instances, but I know of none that will precisely meet this case, and I never thought it necessary to look for nny. I only know, that the Court must necessarily possess a power to commit for any crime, upon probable evidence of guilt being exhibited to their view. Now, if precedents are so necessary, they must come from the other side, to prove that the Court do not possess that power. I regret that the duty which I was obliged to perform, did not authorize or permit me to let Mr. Wickham know my intention for making this motion, else it might have saved him the trouble of referring to the law which he has produced: a law which has not the least connection with this case, because the person is not in confinement. I have said that I know of no precedent; but, I have very little doubt, there have been cases of persons being brought before a Court, and committed for trial. However, I have had but little to do with the criminal code or practice. It is said, that the proper course is, to send this to the Grand Jury; consequently, we are not to take our own course, but that which is pointed out to us by our antagonists. Well, we must send up our Bill of Indictment to the Grand Jury directly. Suppose we take the gentleman's assertion, (for it is nothing else—I have really heard nothing like argument) and send up the Bill; the Grand Jury will, as they are bound to do, spend a long time in examining this host of witnesses. Sup-

pose some of those people who are peeping and prying about any where, and every where, for information, were to find out that the Grand Jury were likely to return a true Bill for Treason. I know that the Grand Jury will keep their own counsel; but something or other might leak out which might admit of a construction to favor such an impression. This might find its way so as that the prisoner might avail himself of it, sufficient to awaken his fears, (if he is susceptible of fear, as others, or most men are) and he escapes! What then becomes of our Indictment? He might quit the United States. I do not say he would be inclined so to do; but I will say, that were he to do so, the whole world would say we had done wrong for leaving it possible for him to escape, when it was within our power and duty to prevent it.

It was asked why General Wilkinson was not here. Sir, there has not been time. I do expect that he will be here. I have ground to believe it. He has been sent for. [Here Mr. Hay produced an affidavit, stating, that a messenger was seen on the confines of the Mississippi about the 4th of May, bound to New-Orleans, supposed to be with an order to General Wilkinson, to attend at this place immediately. It also stated Gen. W's expectation of such an order; to obey which, he held himself in readiness. A letter was also produced from Mr. Rodney, Attorney General, saying, that measures would be taken to secure Gen. W's attendance, and that a vessel was to be in readiness for his prompt embarkation.] It will now be optional with Mr. Burr to go or remain; but, if our motion succeed, we shall secure his attendance when Mr. Wilkinson arrives, under a heavy penalty. The gentleman repeatedly asks—Why is not General Wilkinson here? Why, Sir, he knows himself: he knows that a military officer cannot leave his post without orders. Let him reflect, and his mind might be perfectly satisfied. Mr. Rodney left this place (Richmond) on the 5th of April: he arrived in Washington on the 8th: after that, an express was to be prepared and sent to New-Orleans. After the express got there, suppose Gen. W. allowed himself to accept of his privilege, and to go by water. Every thing there is uncertain. If he was on the water during two gales which we have had, we know not what might have occurred; he, probably, never may be heard of again, nor see the United States.

We hear much of prejudice, and the like, instead of answers to plain argument. Much has been said, to be sure; and much will ever be said about any man that shall act as Mr. Burr has acted. But, Sir, I will ask if much has not also been said in favor of Mr. Burr? Yes, Sir, in this very city, we have read much, very much, in vindication of his designs. The press has never been shut against him more than against his opponents. He has had a full share of its support. The public mind is averse to stopping the press; but, when a man, acting like Mr. Burr has done, complains of calumny or prejudice, what can we say, but ask, wherein is the consistency of the gentleman's complaints on that head? If the

press has seemed against him more than against other men, it is because his character and conduct have furnished such a mass of matter against him, that it could not be withheld from the public eye. From these views, wherein can Mr. Burr complain? How comes it to pass, that the gentleman has shut the door—the only door where correct information can be had? It is in his power to stop the tongue of prejudice, if he is innocent of what he is charged. We want to submit these things to a Grand Jury; and, not merely that, but we want to wait until all that can be unfolded of the transaction, shall be produced. Every thing will be examined by its proportional value; and if things shall appear to vary from the representations which have been made, and the popular opinion shall be changed, then, that prejudice, which is so much complained of, will be dissipated by the light of truth and evidence. If, then, he is anxious to be relieved of this popular prejudice, let him divest himself by a public and unbiassed examination.

As to motives, Mr. Wickham declares, he has no doubt of the purity of ours. I can assure him, that I believe him to be governed by the best of motives. But, he says, that, however pure our motives may be, the effect will be the same. Now, as to effects, the whole belongs to them: if bad effects be the result of our discussions, or of the examination, it will be of their own producing; for, Sir, what do we ask? We ask only that security for Mr. Burr's appearance to meet the charges which will be exhibited against him, that the case requires. If we can be satisfied that he will stand his ground, and answer to our indictment, we shall be content. I do not mean to hurt the gentleman's feelings; far be it from me; I scorn it: but, I must not indulge fear of it; I must do my duty, be the event what it may; for I consider myself bound under the most solemn obligation to do the duties of my station. I can assure the gentleman he is mistaken as to the weight of our testimony: he may suppose that we cannot sustain an indictment for Traason; but he is grossly mistaken. Our evidence, leaving out all written documents—our parole testimony will be sufficient to satisfy a Grand Jury as to their return. This is the course we wish to pursue, and this we consider to be the only effectual mode to attain our end. Before I close, I beg leave to declare, most unequivocally, that I have no object whatever in view, but to do my duty.

Mr. E. Randolph said, it was impossible that they should avail themselves of the advantages which would result to them, were the course now proposed to be pursued. It was certainly improper that the Grand Jury should prejudge from any previous impressions which they may be able to form; and upon this ground it was, that questions were asked them previous to their being impannelled. And now it was proposed again to open to them a source of information, upon which they would be afterwards called to decide. They are not only not to express themselves, but even the forming of an opinion must have much tendency towards prejudging their

own deliberations. And is that impression only to be drawn from the relation of the evidence here? Sir, the sentence of the Defendant from that Bench will tend to defeat an impartial subsequent examination, and very far go to fix the destiny of the accused, in yonder chamber. An offer was made to us to postpone this question until to-morrow, but we could not embrace it: we had prepared a proposition, but were unexpectedly prevented from offering it, by the motion for commitment. We must meet it: we do meet it.

I beg leave, Sir, to retrace to this Honorable Court, the history of this judicial transaction. Mr. Burr was brought here a prisoner: the question then was agitated on the propriety of demanding bail; then was that little file on your table produced; affidavit after affidavit was exhibited; examination was stretched to increase the prosecution; and charges were talked of, which were not produced. What did it amount to? Treason? No. Then we will bind him over. He was bound over for his appearance; and, to give greater force to the certainty, you add to the recognizance, that he should not depart from this place. After obtaining all the satisfaction you wished, the recognizance was completed, for him to appear, to answer on a charge of misdemeanor to this Court. But what did you do? You opened the door for ulterior prosecution. Well, Sir, ready to face the world, and fearless of an examination into his conduct, on Friday last, Mr. Burr appeared. That day passed away—Saturday passed away—Sunday came: a day of rest and retirement to some, but to the States' Attorney, a day of invention. He generated this new-fangled motion!—Such a motion, as I will venture to say, was never known in our system of jurisprudence. We make this bold assertion, and then he says that we demand precedents. From whom is the precedent due? From that gentleman. The precedent is always due from him who takes a case out of its ordinary course, and who took this out of its ordinary course, (Mr. Hay.) From my practice of thirty years, at the Bar of this Commonwealth, I never knew of such a thing; I never heard of such a thing; I never read of such a thing. I presume that we may consider this case in the same light, as it presents itself under the Federal system, as before a Judge under the State system. And what is that? Why he is bound over for trial, and told not to depart till the law gives him power. But was it ever known that a Judge took up the subject in any other view, and increased the bail? I will say no: there never was such a case, and no lawyer ever heard of such a thing. If the reason be asked, it might be answered upon the impropriety and versatility of the measure. Suppose, for instance, that Mr. Burr had been taken on Blannerhasset's Island, and had given bail in any specified sum; he had came to this Court according to direction; and, the third day after his appearance and expectation of his trial, he had been told—We are not ready to try you yet, but you must instantaneously give bail in such a sum, being a further bail; he might answer—I cannot; you have brought me here, four hundred miles from my friends; I am

here agreeable to engagement; I have acted faithfully. The Court suddenly take up the case; and, because he cannot give the bail demanded, he is thrown into prison till trial! This may be the case of any person. And can we say, Sir, that Mr. Burr has friends to help him with further bail? We do not know that he has. But it is not the ability of the man I look to: it is the nature of the evil, and the error of the proposition Never, never will I sanction an oppression, because there is power to oppress.

Sir, I have nothing to charge Mr. Hay with in point of candor; it ever was his character; but do you suppose that any light is now added to our view of his intended vigor in the prosecution? Was it not his intention, clearly, at a former examination, to have proved Treason: Treason was the aim of his researches, but he failed in the proof. Why should it be otherwise now? We were aware of this threatened danger; and yet, Sir, we stand firm to our ground; we flinch not an inch. The general alarm, and the same reasons which the gentleman wished to avoid the disclosure of, might have operated to prevent Mr. Burr being here at this time: but we feared it not. Why should the gentleman, having failed in one attempt, come again upon the same ground? He cannot say that he is better informed of General Wilkinson than he was then. The affidavit was here then, and I suppose the same ground will be again taken.

There was a remark made by Mr. Botts that cannot be answered. He told you, Sir, that they had changed the order of justice in this proceeding. And has not the prosecutor done it? Has he not now submitted to you what ought to be submitted to the Grand Jury? His witnesses are all before you; he is ready to proceed. Yes, but how? He will produce such of them as he pleases to you; if any one of them should be suspected to operate the least to our advantage, he will be put on one side. Are you ready to give this advantage to a public prosecutor? I now speak on the principle and on the danger of permitting a public officer of this sort the garbling of witnesses. I know the gentleman's integrity; but the time may come, when this might be held up as a precedent for unfeeling, persecuting men to go upon. Then, Sir, do you mean to be *pioneers of blood* for a Grand Jury? Are you to be called upon to lead them forward, and render them assistance to bring in a true Bill, instead of leaving them to their own cool, unbiassed minds, and sound judgement? Was it ever done to your knowledge? Sir, you put 16 men into a room; you tell them to do justice on all cases that may come before them; but how are they to do justice, if their minds are to be perplexed with previous decisions from your Honorable Bench? Your Grand Juror's minds may be pure, but I ask, will not this proceeding tend to bias them? Can it have no effect, when, although they do not hear the arguments and evidence produced here, directly, they have that opportunity at almost every post in the town? If you mean to preserve your Grand Jury unbiassed, commit the cause to them

Let them examine it according to its weight, and justice will be done. But, Sir, rather than permit a Grand Jury to harbour a biassed opinion, and go polluted into their room—rather far would I see it struck out of existence as an inconvenient organ of justice. It would be no less injurious in its effects. Gentlemen ask us why we do not let the cause go on, when we complain of delay! How can we? The delay is occasioned on the part of the prosecution. If they had sent up their Bill to the Grand Jury on the first day of the Court, there would have been no delay: every thing would have taken its proper course. Sir, we are now here; we are in your power; we will, with acquiescence, submit to your opinion; but we stand acquitted, by opposing what we thought wrong. I do not say that the gentlemen concerned in this case, in opposition to us, have sought delay with any wrong intention; nor do I say, that the government have that design or inattention. Delay has been, indeed, far from the characteristic of the government on this business; for I must declare, that I never have seen any one step undertaken and prosecuted with so much industry as in this case: but at this time we have to complain of delay. We are told that Gen. Wilkinson is not yet arrived. And when will he arrive? The post can travel to New-Orleans in 17 days, and this leaves time sufficient for him to arrive; but this Gen. Wilkinson, with gigantic bulk, could not be here; and because this huge man could not be here, or is not here, are we to be thrown into prison, and deprived of the society of mankind? Gentlemen charge us with having changed our tone since the commencement of this business. How changed our tone? Do we not ask for a trial immediately? Has not this wish always been expressed? We are charged with objecting to the mode proposed, for some reason or other. Now is it not reasonable that we should object? Is it not reasonable that we should oppose the influence of your authority being taken up to the Grand Jury with the Bill which might be presented? Fair dealing, human laws, and human liberty, all conspire to oppose such an engine of influence being used to our detriment. At least, before that course is taken, let some black letter, or some modern precedent be introduced, to apologize for a measure which we will now dare to call unprecedented.

It was more than suggested, that we wanted to destroy the power of the Court, because a Grand Jury was in existence. Sir, the power of the Court will not be impaired; it cannot be by any act of ours; it is not wished by us. We are brought here to answer whatever may be brought to our charge, specially and ulteriorly, if necessary. Is it not necessary, circumstanced as we are, that we should ask for the examination of a Grand Jury into our alledged crime, rather than that our fate should be anticipated by the Court? I beg the Court to pardon me, for I have the greatest confidence in the justness of their decision; but, after that decision, I must apprehend the consequent effects. It is now asked by you to strengthen the prosecutor's security for Mr. Burr's appearance, and that with

out any additional circumstances of guilt. There may be, to be sure, another little affidavit, to splice out that which was before deficient! Every thing which before could be collected, was exhibited to the Judge. Presently comes in another affidavit; and thus, from day to day, we are to be compelled to meet affidavits, which cuts a single fact into so many pieces. One day bail for 1000 dollars is demanded; another day another 1000; next day more; and so on, from day to day, till your heap of affidavits create a burthen of bail which no man on earth can sustain. Why do we shrink, we are asked? Sir, we do not shrink; we stand firm. We demand to know when we are to come forward; and we have ground to press that demand, because the prosecutor says he has evidence sufficient to hold him out.

We have heard eulogiums upon the administration, that it would disdain to persecute, and that its measures were consistent with propriety. This, Sir, I shall never deny; but I will say, that the measures taken towards Mr. Burr have not been marked with that tenderness and propriety which consisted with all the strict rules of right. Sir, when I see the man who is at the head of the government, I see one with whom I have been long in the habits of intimacy and affection, which cannot soon be obliterated. When I look at the second man in the government—he has my whole soul; I love them both most warmly.

What has been done? When I look into actions, it is not the intention, in this public view, that I regard; but I look at the effects they produce. Thus, a man may intend well, when he does an action; but it may have a most baneful effect. The orders which have been issued from the highest source of authority respecting Mr. Burr, have had this effect upon the minds of the people at large. Orders have been given to burn and destroy him and his: neither property nor person was to be regarded. Again we find the House of Representatives, during the last session, demanding of the President, a history of the transactions going on to the westward; the President communicated them accordingly; and would to God he had stopped there. But he did not; he went further; he acted in the Judiciary character; he said Mr. Burr had been guilty of what he ought not to have done! This had its operation upon the people, and has been the cause of nine tenths of the clamour which has been raised, and extends itself over the whole country.

It may also be necessary to take notice of the seizure and conveyance of Mr. Burr to this place, which a gentleman has said was all that we could call his persecution, and that was conducted with the greatest humanity. Fine humanity indeed! He was seized in the Mississippi Territory. Is there no Court there? Are there no Judges there that can be confided in? Already had his case been submitted to a Grand Jury, and no Bill was found. Already had he been tried and acquitted. But this would not do; he must be brought here. On his way to S. Carolina he is seized on by a military power, and *humanely* guarded by muskets, ready

to shoot at him. And all this force, for fear he should converse with his only child! The same sort of humanity which Perkins exhibited, has marked the whole transaction. Humanely brought Col. Burr 1200 miles, and what for? For a little transaction said to have occurred on a little tract of an island said to belong to our territory. A far better epithet for this transaction would be, to call it *inhumanity;* and, such as I hope never will be supported by any gentleman at this Bar.

I hope from what I have said, Sir, that I have not incurred the charge of removing the charge from the head of Mr. Burr, and placing it on the government. I should not have gone into this, if it were not that I think all the friends of liberty, and fair, unbiassed trial, must approve of our defence of a man, whom we consider to have been injured. I cannot conceive what the Attorney meant, when he said, that there were people peeping into all corners for the discovery of incidents, and seeing what is going on. If by this we are to understand him to mean, that we are privy to, or instigators of any such measures, I shall deny the fact. We defend not ourselves in such a way. But that facts do escape unobserved, is certain. The gentleman may wish to prevent a Grand Jury from observing the measures of the Court, if he pleases; but he cannot do it; for what is a current source of conversation, will, and must fall into the way of a Juror as well as another person; and on that ground, it is, that we wish not to give them a prepossession, but commit the case to them at once. If that is done, we fear no harm; we conform to the usual custom; and we can look forward with safety, assured that we are not the victims of an oppression originating from the occasion, and without precedent or propriety.

Mr. HAY rose to explain some passages which he thought Mr. Randolph had misquoted. He proceeded in the argument on that point, where it was said that the Court could have no cognizance, but the Grand Jury had. He put a case.—Suppose, said he, there was to be nothing for the Grand Jury to do, where could be the objection to discharging them? Or what barrier could there be in the way, of proceeding in exactly the same mode as was now proposed to proceed? Proof of the treason would then be required. What is wanting now? The very same thing. Would it not, then, be much better to go into the examination at once, than to subject Mr. Burr to several months anxiety, without a trial? The gentlemen say they are ready for trial. Why are they ready? It is because the most important witness which the United States can get, is absent; but that witness is actually on his way. Much had been said by the gentleman last up in eulogy of the government; but how does he conclude about its measures? They are charged with a bitter persecution, which is entirely unmerited. Where then is his reference for it? Were I indulged, says Mr. Hay, to speak my opinion of the administration of our country, I would say, that you may traverse the world, and where would you find a man, whose long-tried

and uniform conduct has more been directed, (and with success) to promote the liberties of the people at whose head he is. I am sure these are the sentiments of Mr. Randolph, notwithstanding his expressions about persecution.

Mr. WICKHAM. We have repeatedly called for precedent upon this motion; but, understand, that no such document is to be found, either in this country, or in that whence we receive our code of laws and precedents. This, I understand, the gentleman to admit. Is it not possible, Sir, that a material witness should be as far from the Court of King's Bench, as General Wilkinson is from this Court? And yet, we never hear of a precedent, in which the excuse is made to govern the Court. Let us examine into General Wilkinson's probable evidence with respect to the charge now exhibited:—What can he prove with respect to Mr. Burr's levying of war against the United States, within the State of Virginia? I well remember, that when General Wilkinson's affidavit was taken up before, it was declared, that this testimony could not apply to the case at all, as it respected levying of war; and yet we are to hear of the importance of this man's testimony, when there is not a tittle of proof; and it is believed, that he has not been in the State of Virginia these five years. What is there in that affidavit? There is a story about a seal and a cypher! What can this prove? Nothing. Have they any other evidence about these things? If they have, why not produce it? It is questionable whether this is sufficient proof to send to a Grand Jury. But the Attorney says, he has sufficient proof, independent of this, to send to a Grand Jury, which he conceives will fix the crime. I know the gentleman's ability; and I am sure that he has the will, if he thought he had sufficient proof. Why does he not send it up? Why, there is a man in N. Orleans, or in Indiana, or somewhere, that will strengthen my proof! And so we are to be held in jeopardy, because the gentleman has not prepared his witnesses. Mr. Hay declares, that he does not want to oppress Mr. Burr. I am sure he does not wish to oppress; but what shall we say, when we feel the oppression? What is the object of this dalay? I do not say that it is for oppression; but, it certainly does result in oppression. He wants to get better proof; and, with the same breath, he declares that he has ample testimony to satisfy his own judgment! This is the time, Sir, that we are prepared for trial: we are come here for that purpose. I will ask, whether subpœna after subpœna has not been taken out of your Clerk's Office, at an expence to the United States, of, I do not know what; and yet he now asks a postponement! What can you think, Sir, of a man who shall declare himself prepared to go to trial, and then request a postponement on account of the absence of several material witnesses? Here is the affidavit of a man, seen near the confines of Georgia, who was supposed to be carrying dispatches to General Wilkinson at New-Orleans. This was on the 5th of May. Allowing seventeen days to come here, which is the time the mail travels in, there was time for him to have been here.

The gentleman asked, suppose he was to dismiss the Grand Jury, what could we say? This is to be supposed, I allow; but, I trust, there is no probability of it; for I do hope, that before the end of of this term, we shall see the close of this unpleasant business. But if he does dismiss the Jury, what will be the result? Either that he will stand the charge; or that, if the Court should overrule us, there can be no reason why he should avail himself of his own act, and take extraordinary bail, when common bail ought to be sufficient. My opinion, however, is, that instead of increasing the bail, it ought to be reduced. We have heard much spoken about our liberties when connected with such an administration as we now are under; but, Sir, of what advantage is that liberty to us, when we are restrained from the power to receive it?

Mr. BURR rose, he said, to add a few words to what had been said by his Counsel. He was really disappointed, that, when a motion of this kind should be made, nothing like precedent was produced; and yet, without precedent, the prosecutor calculates upon obtaining his motion. There may be, to be sure, such a thing as a reasonable procedure without precedent; whether this be so or not, will be examined into. It is asked, whether the Court has not authority to commit; or, whether a single Judge has not that power? Herein, is the attempt made, to conceal the real object. Sir, there is not, there cannot be an argument upon this point. No body will deny, for a moment, that authority to the Court. The Court in session, or a Judge out of Court, may commit, upon "probable cause" being shewn. Were it otherwise, there would be impunity in the commission of crimes. It is essential, for the due administration of justice, that a power should rest somewhere to bind over, upon probable cause: and this power is defined.

But, Sir, let us see what is the real fact before us. Facts are always better than mere reasoning. Let us see if there has not been time for the government to produce probable cause, if such were to be had. This time cannot be limited to the government of any precise rule, but must be submitted to the sound discretion of the Court. Two months ago, when examination was had here, and bonds executed for my appearance at this Court, it was thought that there was sufficient time to make out the probable cause. They have failed to do it; and, this should operate as a reason why they should not now attempt to increase the burthen of security. We find nothing now but bare declarations. They now say that it is in their power to produce more than probable cause; to produce a Bill of indictment upon sufficient testimony. Now, Sir, the true time at which these gentlemen ought to be prepared, is the period of the transactions charged. It will be recollected, that five months ago, it was said, that this crime of Treason *had been* committed—had been committed by me—and they went so far as nearly to designate the place where it was committed. But we will reduce it down to its nearest period, and repeat that it was certainly within the view of the prosecutor at least two months ago. Now, it has been

said that a messenger would take 17 days to go to New-Orleans: It has been done in 12 days; but, I think, if we allow a proper medium, we may say 15 days. If a messenger could travel there in 15 or 17 days, has there not been ample time to return in two months from starting? As soon as it was known where the trial was to be held, and the precise time of that trial, measures ought to have been taken by the government immediately to procure their witnesses to sustain the charge. I was called upon to be ready: I announce myself to be so. But now, without precedent, and without propriety or reason, because the prosecutor is not ready, a motion is made for commitment, and we are to witness a partial examination of testimony, of the nature of which we are unapprized of; except, indeed, affidavits; of which not only we have been apprized of the contents, but also every body. Every Grand Juror, and Petit Juror, who will be called to examine into my case impartially, knows that part of the evidence that will be brought, *ex parte* against me, without explanation. I can obtain no farther knowledge of the process intended, or the charges exhibited, than my Judges know, and my accusers choose, with which I can avail myself of any measures of defence.

Another objection we have to this procedure is, that it would tend to the committing of the Court upon a point of fact; and, if the Court should pronounce probable cause does appear, that opinion will go up to the Grand Jury. Thus the Court and the Grand Jury are to pronounce upon the same species of evidence, which is palpably wrong.

A sufficient answer has been given to the subject of delay, drawn from our declaration, that we are prepared to proceed to trial.

But, Sir, we are charged, when we are talking of the severity of our treatment, with impropriety in bringing into view the government, as the cause of any such thing. I shall not be so charged. But I will maintain that no government, when they place themselves as a party, ought to claim merit in their prosecution. This I may examine, and on examination, must declaim against. Every person under the immediate controul of the government, must be supposed to exhibit its will. A vast discrimination must therefore be expected, and the inconvenience and real injury to the weakest party must be extremely evident. Now, if ever there was a case in which this disproportion was experienced, it is the present. The government has manifested a zeal and interest in my case, which has rarely been exhibited on any occasion. If there is any tendency in the government to do any thing but equal justice, we cannot but suppose it to have been lately exhibited. Sir, I complain of persecution. And shall it be said unjustly? What is persecution? Persecution is any thing that alters the forms of law to the injury of any individual. Of this, Sir, I have abundant experience. My friends every where have been seized by military authority;

imprisoned, and taken about from place to place at will, to their inconceivable injury. I do not know that this has been the case in any former period, at any time or place. Besides; compulsory examinations have been resorted to. Seized by an armed force, carried before a Magistrate, compelled to give testimony (whether against themselves or not, was not regarded), papers seized, and every other species of oppression that could be imagined was used to procure information of *supposed* facts. I well recollect a case in England, where a gentleman was detained in prison unlawfully by the Secretary of State, but two hours, if I mistake not, and on suing for damages of false imprisonment, he recovered 1000 guineas. In such light is the invasion of private right considered in that country, and so sacred is personal safety.

But, Sir, it was not only my friends that felt the weight of persecution, but myself—without Court, without Judge, without Jury, I was condemned and executed: such influence was established in public opinion. An order was given to seize all I had of property, and thus deprive me of that which only a Court had a right to do. But not content with that, the post-office, which ought to be the deposit of secret and security, was most outrageously and barefacedly violated in many instances. Shall any man go to the post-office, by any authority whatever, and enter into any intercourse with my friends with impunity? And yet, Sir, this has been done within a very few days. I think this is not right. I think that a gentleman high in office would have been presented, had not the Grand Jury been suddenly dismissed. Sir, I do not think that this consists with the genius of our government, more than some other difficulties and injuries which I have laboured under, Denied the priviledge of the *Habeas Corpus;* denied the use of pen, ink and paper, and other privileges of human beings! Whether this be consistent with State policy or not, I will not say; but I know that it is not consistent with human liberty or humanity.

What am I accused of? Treason. And is this the way to search for Treason? It is not one of those crimes that lurks in holes and obscure corners, that can be buried in a man's own breast unseen. It must be seen; it will admit of proof, if committed. This treason, Sir, was said to consist in a civil war that was raised by me in the country. A civil war that would take six months to find it out, and the spot where it was committed! Once I was taken up about this civil war. All the researches then made near the supposed spot, were ineffectual. I was discharged. Well, in about two months afterwards I was again taken up. The Grand Jury could find no Bill. In that case the Judge was so urgent, that he even volunteered himself to do the business of the Attorney. However, I was dismissed, but with this kind of treatment. And yet again here is civil war talked about. I am again before a Court. Civil war, indeed, there was abundance of, but where was it? In the newspapers. They teemed with it. But, Sir, I will say there was war, if not civil war. This is not difficult to prove.

There was war with Spain, and this is certain, and will admit of proof in half the time that has been taken to look for civil war.

Suppose the Court should conclude that there is probable cause, and order a new recognizance; when is this made returnable; is it to the next term? I think the laws of Virginia so directs. Or, Sir, am I to lie six months in gaol before it can be found out where this war was, and all the witnesses ready here to prove it? I know that the Court will see the force of all these things, and to their judgement I am willing to abide.

TUESDAY, May 26, 1807.

The CHIEF JUSTICE this morning delivered the following opinion of the Court:

In considering the question which was argued yesterday, it appears to be necessary to decide—

1st. Whether the Court, sitting as a Court, possesses the power to commit any person charged with an offence against the United States?

2ndly. If that power be possessed, whether circumstances exist in this case, which ought to restrain its exercise?

The first point was not made in the argument; and would, if decided against the Attorney of the United States, only change the mode of proceeding. If a doubt can exist respecting it, that doubt arises from the omission in the laws of the United States to invest their Courts, sitting as Courts, with the power in question. It is expressly given to every Justice and Judge, but not to a Court.

This objection was not made on the part of Colonel Burr, and is now mentioned, not because it is believed to possess any intrinsic difficulty, but to show that it has been considered.

This power is necessarily exercised by Courts, in discharge of their functions; and seems not to have been expressly given, because it is implied in the duties which a Court must perform; and the judicial act contemplates it in this light. They have cognizance of all crimes against the United States; they are composed of the persons who can commit those crimes; and it is obviously understood by the Legislature, that the Judges may exercise, collectively, the power which they possess individually, so far as it is neceessary to enable them to retain a person charged with an offence, in order to receive the judgment which may be finally rendered in this case. The Court say this is obviously understood by the Legislature, because there is no clause, expressly giving to the Court, the power to bail or commit a person, who appears in discharge of his recognizance, and against whom the Attorney for the United States does not choose to proceed; and yet the 33rd section of the judicial act evinces a clear understanding in the Legislature, that the power to take bail is in possession of the Court.

If a person shall appear, conformably with his recognizance, and the Court passes away, without any order respecting him, he is discharged. A new recognizance, therefore, or a commitment on

the failure to enter into one, is in the nature of our original commitment, and this power has been uniformly exercised.

It is believed to be a correct position, that the power to commit for offences, of which it has cognizance, is exercised by every Court of criminal jurisdiction; and that Courts, as well as individual magistrates are Conservators of the Peace.

Were it otherwise, the consequence would be, that it would become the duty of every Judge to descend from the Bench, and in his character, as an individual Magistrate, to do that which the Court is asked to do.

If the Court possesses the power, it is certainly its duty to hear the motion which has been made on the part of the United States; for in cases of the character of that under consideration, its duty and its power are co-extensive with each other. It was observed, when the motion was made, and the observation may now be repeated, that the arguments urged on the part of the accused, rather proved the motion on the part of the United States unnecessary, or that inconveniences may result from it, than the want of a legal right to make it.

The first is, that the Grand Jury being now in session, ready to receive an indictment, the Attorney for the United States ought to proceed by Bill, instead of applying to the Court, since the only purpose of commitment is to bring the accused before the Grand Jury. This statement contains an intrinsic error which destroys its operation. The commitment is not made for the sole purpose of bringing the accused before a Grand Jury; it is made for the purpose of subjecting him personally to the judgement of the law, and the Grand Jury is only the first step towards that judgement.

If, as has been argued, the commitment was simply to detain the person until a Grand Jury could be obtained, then its operation would cease on the assembling of a Grand Jury: but such is not the fact. The order of commitment retains its force while the Jury is in session; and if the prosecutor does not proceed, the Court is accustomed to retain a prisoner in confinement, or to renew his recognizance to a subsequent term.

The arguments drawn from the general policy of our laws; from the attention which should be bestowed on prosecutions, instituted by special order of the Executive; from the peculiar inconveniences and hardships of this particular case; from the improper effects which inevitably result from this examination, are some of them subjects for the consideration of those who make the motion, rather than the Court; and others go to the circumspection with which the testimony in support of the motion ought to be weighed, rather than to the duty of hearing it.

It has been said that Col. Burr already stands charged with Treason; and that, therefore, a motion to commit him for the same offence, is improper. But the fact is not understood so by the Court. The application to charge him with Treason was rejected by the Judge to whom it was made, because the testimony offered

in support of the charge, did not furnish probable cause for the opinion that the crime had been committed.

After this rejection, Col. Burr stood, so far as respected his legal liability to have the charge repeated, in precisely the same situation as if it had never been made. He appears in Court now as if the crime of Treason had never before been alledged against him. That it has been alledged; that the government has had time to collect testimony for the establishment of the fact; that an immense croud of witnesses are attending for the purpose; that the prosecutor, in his own judgement, has testimony to support the indictment, are circumstances which may have their influence on a motion for commitment, or on a continuance; but, which cannot deprive the Attorney for the United States of the right to make his motion. If he was about to send up a Bill to the Grand Jury, he might move that the person he was about to accuse, should be ordered into custody; and, it would be in the discretion of the Court, to grant or reject the motion.

The Court perceives, and regrets, that the result of this motion may be publications unfavorable to the justice, and the right decision of the case; but if this consequence is to be prevented, it must be by other means than by refusing to hear the motion. No man, feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice (especially in criminal prosecutions) can view, without extreme solicitude, any attempt which may be made to prejudice the public judgement; and to try any person, not by the laws of his country, and the testimony exhibited against him, but, by public feelings; which may be, and often are, artificially exercised against the innocent as well as the guilty. But the remedy, for a practice not less dangerous than it is criminal, is not to be obtained by suppressing motions, which either party may have a right to make.

If it is the choice of the prosecutor on the part of the United States, to proceed with his motion, it is the opinion of the Court that he may open his testimony.

Mr. HAY rose, and declared, that he was fully sensible of the inconveniencies which might result from a public examination of the witnesses at this stage of the prosecution; that nothing but the necessity of taking this step, to secure the appearance of Mr. Burr, to answer the charge, had induced him to make the motion for commitment. He was willing, therefore, that if any arrangements could be made, to obtain the same end, and to obviate the inconveniencies mentioned by the Court; and, having understood from the Counsel on the other side, that they were disposed to confer with him, and the gentlemen who assisted him, on the subject of adopting some arrangement, he would then request permission of the Court, to retire together for a short time, to confer on the subject.

The Court having consented, the Counsel on both sides retired; and, after the absence of a few minutes, they returned, informing the Court, that they had not been able to come to any agreement,

but wished a longer time to consider of measures towards that desirable end. This was accorded in by the Court, and the farther proceeding postponed until the next day.

WEDNESDAY, May 27.

Mr. HAY, (who, it appeared, had proposed to take bail to a certain amount, for the appearance of Mr. Burr to trial, received, while in Court, a note from the Counsel, refusing to acquiesce) said, that he was very sorry he was under the necessity to continue in the cause in the way he had proposed, which he should do, whatever might be the consequence. As much, however, had been said about the effect such an examination might have on the Grand Jury, he could wish to prevent any evil consequences, by suspending the publication of it until after the Bill should have been returned from the Grand Jury, or till after the trial. He supposed that it would be proper for the Court to instruct the Stenographers, who attended, to take notes to that effect. He did not, however, apprehend any injury from such publication: he was not afraid of any.

Some conversation occurred on this proposition; but, as neither side exhibited the least anxiety on the subject, no instructions were given by the Court.

Mr. HAY then said, he should proceed to examine witnesses; which he proposed to do in chronological order, so as to bring out the earliest circumstances to view first, and so progress.

This method was opposed by Mr. WICKHAM; who observed, that, according to the established rules of evidence, it was incumbent on the prosecutor first to prove the overt act of Treason—that the Treason was committed. And secondly, that Col. Burr was the party that did commit the Treason. Every point of evidence that did not amount to these two points in their rotation, ought to be rejected as evidence at first. Chronological order had nothing to do with it; it was proper to come to the point direct. What had this man's letter, or that man's saying, to do with it, until the charge was proved? Every person who introduced testimony to a Court according to the order which ought to be, and it was usual to observe, must regulate himself by strict *legal orders*. As to affidavits, he should have something to say about them hereafter. He hoped the Court would prevent any proceeding but what was legal.

Mr. HAY supposed, that the gentleman would be glad if it was not to be brought forward at all; but, he considered it to be his duty, to bring forth the evidence in such a way as most suited himself, however much he might be obliged to the gentleman for dictating a rule to him. However, he should not obey him in this matter. He hoped to convince the Court, that the requisition of Mr. Wickham could not be complied with. He had talked of two progressive points to which the evidence must go direct, before any other matter could be examined. But it was impossible so to proceed; the two charges were so blended together in their nature,

as to form two distinct, inseperable parts of one great design. He knew not precisely what that design was; but, from what appeared to him, it was to obtain the conquest of some Spanish provinces. But, in order to obtain that object with effect, it appeared to be Mr. Burr's design to take possession of the city New-Orleans, where he could obtain suitable supplies for that purpose. How, then, was it possible to seperate them? Every step that was taken towards the accomplishment of the one main object, was connected with that object. If the design was to plant his flag in New-Orleans, and make that his place of rendezvous previous to making the conquest of Mexico, every part and measure that was pursued towards the facilitating that step, was a part of the whole; and every tittle of evidence to be produced, must look towards that end, or it will be ineffectual; and if it does appear to look towards it, it must be received according to its weight. Since, then, every step that he took towards the conquest of N. Orleans, was one step in advance towards the conquest of Mexico, how was it possible, line by line, and word by word, to seperate the testimony, least all of it might not have a bearing upon every particular part of the crime?

It appeared, Mr. Hay said, as though the gentleman was determined to stop him at the very threshold of every thing which he attempted to do. How could he advance? When could he advance? Was every inch of ground to be measured out to him with such strictness and objections? If so, the trial, instead of lasting ten days, would last ten years. What is the proposition that is now submitted to you for the first time in this country?—*For the first time in this country*, I repeat? Why, Sir, it is, that we are to steer our course in a way in which it is *impossible* for us to move for five minutes, without having to encounter insuperable difficulties. The gentlemen have so repeatedly asked for precedents: we, on our parts, must now ask—Where is *their* precedent? In what case was it ever known, that the Court were dictated to, of the manner and form to produce their testimony—and more particularly so, on a mere motion for commitment? I repeat, that *it never was done before*, and it ought not to be done now.

Sir, *I am done*. The gentlemen may make as many motions as they please—I will say no more. I will go on with the evidence. But how often am I to be stopped? I know not. What an immense loss of time, the Court must perceive there will be, if we are thus to be hampered at every step. If the depositions or the witness should extend to any thing which ought not to be heard, the Court are adequate to stop them. Do the gentlemen distrust the judgment of the Court? No, Sir; they do not; but they want to involve us in every difficulty which they can possibly invent. The allegation which we make, is of the most serious nature: it goes to affect the life and property of the accused. He has come boldly before this Court; and, not only declared his own innocence; but has, more boldly, charged the administation with repeated acts of persecution. But, Sir, does it evince his innocence and integrity,

in answer to this charge, to oppose every instance of examination? Is this the way to confound the testimony produced against him? No, Sir, it is not; and, therefore, I trust the gentlemen will permit the cause to go on under the direction of the Court, as always has been done in respect to evidence.

Mr. WICKHAM. When the gentleman said "he would go on," he must have the privilege, on his part, to object to that mode which he appeared to be taking. Such monstrous strides were inadmissible, as their consequences might be dangerous. He knew not how soon the time might come, when a party should not be at liberty to be heard by Counsel at all. If the gentleman, as he declared, would go on, Mr. W. must, on his part, say, that he must be at liberty to object to his career—and in such a way, and at such a time, as he saw proper.

The gentleman appears to have in view two distinct charges: the one, the Treason of which he speaks; and the other, the expedition to Mexico: which it appears he means to take up hereafter, failing in the first; and, which, Mr. Burr is bound to answer. But, he says, they are so necessarily connected, as to be inseperable in their examination. But how are they necessarily connected? If the gentleman were to choose to drop the Treason, and select in its place the misdemeanor, would not the Court bind him to that point in his evidence and observations? Certainly. Then, if they would be unconnected in such a case, how are they inseparable now?

We hear much about expedition and waste of time; but, Mr. W. trusted, that the patience of the Court would not be exhausted, if the Counsel on either side should choose to investigate the points advanced. Sir, if the gentleman should go on in the usual course, we shall not object; but, if he chooses to go contrary to rule and precedent, and wander into unaccustomed paths—then we will give measure for measure, and do our endeavour to dissipate every difficulty that envelopes the discussion. Sir; they came here and demanded what never was asked before; and, because we are bound to restrict them in their course, they ask us for precedent. However, we can with boldness say, the course which they are desirous to pursue, is quite novel: it never was demanded either in this country, or in the extensive practice of the English Courts. It never has been the practice to come forward at one time with new, distinct, substantive, independent charges, so as to avail themselves of such course of testimony as they may select, and yet apply any part of such selection to any of the charges. We come here to meet a seperate specific charge; we are prepared to hear testimony upon that charge; but we are not prepared to know in what way the gentleman might produce his testimony, if it be not in the usual way. However, the Court have allowed, that, by strict law, they have a right to proceed with their testimony; and, they must stand or fall with that law.

They ask us for precedents. Let us look at this state of the case, and enquire where we could get our precedent from? This case is now in a course of examination on a motion for commitment. And where shall we find the proceedings of examining Magistrates? Where have Reporters published cases of such a nature? Where are the volumes of transactions of this kind to be found? They are not extant. By what rule do examining Magistrates govern themselves? By rules of evidence; rules which are never to be relaxed, but upon the most urgent necessity. These rules are laid down to us, and must be followed. For instance; would the gentleman ask his witnesses to come forward without swearing them? I presume not. Would he call upon Mr. Eaton to deliver what he has to say without swearing him? I presume not. Then, Sir, we are inevitably bound by rules of evidence.

But he says the Court are to judge on the legality of the evidence. I have no objection to submit to the decision of the Court to every extent; but, is this the practice? Sir, I have always understood that if a paper was presented as evidence to prove a certain fact, that the contents of that paper was first to be known. It must first be stated what that paper contains. Sir, we are not afraid to trust the Court with any paper, nor are we afraid to trust an impartial Jury, but we do not want to go out of the course which has been established. It is a bad precedent; for how know we, how soon the time may arrive, when a Court shall be left solely to judge of the propriety, or impropriety of testimony, and permit only such to appear as they please? I know that it is the custom in a Court of Chancery, for the Court to examine into all papers; but this is a rule of convenience, and not of necessity, because it may be denied.

The gentleman says, he has a right to preserve what order he pleases. I do not say he shall not; but, we must enquire of the propriety of that order, and of the application of his testimony. Here are, for instances, serious writings, conversations or acts, to come out: is it not proper, that we should enquire first, to what charge it is intended to apply? And yet the gentleman must proceed in chronological order. Sir, let him prove any act of Treason, but let that act be first proved; let him prove the arming of men; for what they were armed; their destination, &c.—and then, that Mr. Burr was concerned in that expedition. This is the course he ought to pursue, and which law and practice point out; and not look back into the most distant, minute, and inapplicable circumstances of life, to support what, as yet, has remained unchanged: for, as Foster's law on high treason observes, "No man is bound, at this time, and unprepared, to answer for the actions of his life."

Mr. Burr. I presume that the object of the gentleman (Mr. W.) was to give notice to the Attorney, that we should expect strict order according to the rules of law. At present there is no

point in question. If the gentleman should proceed in chronological order, or in any order, as he pleases, which we do not think to be applicable to the point expected, we shall then, as he says, apply to the Court to decide. I am far from wishing to waste time. The Court will defend us in all things right.

Judge MARSHAL. It may be proper at this time for the Court to say something which might bear upon the case. In the Supreme Court, on the question of commitment of two persons who were supposed to be connected with Col. Burr, a rule was laid down; that, to commit any person on a charge of Treason, the fact of levying war ought to be proven. It is not an act that can be performed in secret; it must be known to the world. The fact, as to assembling, may be doubtful: it may constitute Treason, or it may constitute some other crime. For instance: The assembling of a body of men may have it in view to benefit the United States; its object might be designed towards another nation with whom the United States are at peace; and yet it might not be treasonable. It therefore must be proper to prove the design, before we can ascertain what species of crime it belongs to. But, it has been declared, and is again declared, and which we are borne out in by the constitution of the United States, that no treasonable design, conspiracy, or any thing attached to it, can be considered to constitute the crime of Treason, or levying of war. To be sure it would save time for the Attorney to lay the facts before the Court first; but if he thinks it would be better to proceed otherwise, it must have its bearing: the Court cannot undertake to govern his mode of producing testimony, under the impression that no part will be introduced, but what will tend towards the fact.

Mr. WIRT observed, that it was the impression on the part of the prosecution, that this was the most lucid exposition which they could give to the facts, to lay the events in the order in which they occurred before the Court. This was done to give the transaction its proper and just appearance.

Mr. HAY elucidated. He instanced that they should have occasion to introduce Mr. Stoddart. That evidence might be construed to have no bearing upon the case; but it would prove the opinion Mr. Burr entertained of the administration. Mr. Hay disclaimed any intention but that of executing his duty in the prosecution; and declared that Mr. Burr might rely on his humanity, for he would produce no testimony not calculated to bear upon the act; but he did think that the overt act would be proven; and that all the other evidence would go to shew the design.

Mr. E. RANDOLPH. Whatever confidence we may have in the humanity of the gentleman, yet we must see, and we would have him to recollect, that in the common course of law, it was not to be expected from, nor did it depend upon him who prosecutes, to shew humanity. We are for law, Sir. Give me leave to say, that although it is the practice in England, it is not so here, to be sure: for there, it is the duty of the Attorney General to state, before he intro-

does any piece of testimony, what he expects that testimony to prove. And it goes even so far as to say, that no evidence shall have weight but what is stated beforehand. If the gentleman were to do so in this case, the Court would be able to discover whether it had the tendency or bearing which it ought to have. Notwithstanding the Court have declared that they would not prescribe a mode of producing the evidence; yet, Sir, I trust that you will recommend to him to produce evidence of the facts first. If we have not at first a view of the facts, what will the explanations avail? Whoever heard of the production of an auxiliary, before the substance was brought to view? I hope that we shall be at liberty to suppress any explanations, where the fact has not appeared in evidence.

Gen. Wilkinson's affidavit was here produced by Mr. Hay.

Mr. Botts, having it in his hand, addressed the Court.

I feel, may it please your Honors, very great difficulty to know, what is the best course to pursue, in the embarrassed situation which the other Counsel have left us; or how we can proceed to our own advantage, since all hopes of advantage are taken from us. We are now left to encounter the prejudices which he has excited; but how to encounter them I know not: whether we should proceed upon the strength of authority, or whether we shall remain silent, and let this unprecedented proceeding take its course. I have as much desire as the Attorney has, for speed to mark our steps; for, I have a much greater stake at hand than he has.

As to what I shall say on the competency of evidence, I shall speak what I most seriously know to be just; and if I should fail in any particular point, I know that it will be made up by others. It is much our misfortune to have been led by the other Counsel into a partial view of this subject; in consequence, it is possible that I may clash in something, but undesignedly; and trust that in whatever I may say, if wrong, I shall be stopped.

There are four or five propositions which it might be proper to discuss, and the paper in my hand may give rise to them all. The main question is, whether this paper is competent evidence in this Court? On a similar question before them, the Supreme Court were divided.

Judge Marshal. No, Sir; the Court were divided whether the annexed letter should be considered as evidence or not; it did not refer to the affidavit: that was received.

Mr. Botts. If I mistake not, when this paper was offered to the Supreme Court, every objection was taken to it: one particular one was, that it was extra-judicial; that it was taken before a Magistrate who had not competent authority: this, however, was overruled. Another exception was, that the substance of the affidavit related to things which were said by Gen. Wilkinson, to be "to the best of his recollection." The Court were divided upon that also, because it was not literally certain: they suppose that the substance, might possibly, in a future examination of the case be

fore a Jury, without the literal certainty, prove fatal to the affidavit.

Supposing myself to be now at liberty to go into the enquiry, whether this paper is evidence or not, I shall proceed and enquire what bearing this affidavit has on the subject as it now presents itself. Let it be remembered that a Court of examination, as well as a Court of trial, must call for the best evidence that the nature of the case will admit of. If the offence is charged to have been recently committed; and the witnesses are proved to reside so far from the Court, that it is impossible they should be here, then *viva voce* testimony must be dispensed with. But, Sir, if Gen. Wilkinson could be here, then is there a man who will not admit that it would be preferable to any affidavit? and shall a man be imprisoned on an affidavit, when *viva voce* testimony from the same person can be had? Let us then suppose, that the circumstances which appeared to the Supreme Court, did not admit of better testimony—who can deny it? It has been affirmed by the test of the highest judicial authority; and yet upon that authority there was not probable cause to commit for Treason; how could it be otherwise supposed now, even were it admitted? Time and circumstances always have their particular weight in the examination of evidence. We now aver, that Gen. Wilkinson could and ought to have been here; but his not appearing, his affidavit ought to be set aside. Will you consign a man to a dungeon on a charge of High Treason, Sir, without bail or mainprize, upon testimony like this affidavit? Not only deficient in the point which was overruled by the Supreme Court, but Gen. Wilkinson did not say that the letter in cypher was in Burr's hand writing; and if he was here, he would not say that it was. Mr. Hay cannot, in the strict rule of law, say that this is proper evidence; and he cannot introduce it as such. That gentleman is not to exercise his sovereign sway; it is the duty of the Court to say what is proper evidence. My proposition, Sir, is, that no evidence of any nature whatever, ought to be taken until there is indubitable proof that there was war levyed in this district, (Virginia), and until it is proved that an overt act was committed by Mr. Burr.

Mr. Hay, interrupting, observed, that the gentleman was again renewing a proposition which had been decided on by the Court. He hoped gentlemen would look to a period when this case should conclude. If not, said he; and we go on in this way, we are doomed to spend the remainder of our days under the walls of this Capitol.

Mr. Burr. I understood that the gentleman who spoke first, apprised the Court, that the evidence should come forward, subject to discussion; which would be made as the evidence went on. I think the gentleman is only going into the nature of the testimony presented.—That is the light in which I view it.

Mr. Botts. I am satisfied that the Court will have no disposition to stop me. I know, Sir, that you will rather hear too much

than too little; and that, in our defence, you will not be so parsimonious of time as the public prosecutor. I will confine myself to matters of fact, which grow out of this deposition. I have gone through a part of them, but there is a very important one yet remaining. It is, that if it is proved that war has been levyed, the overt act must be proved by two witnesses. Now, in the examination of these things, the question is, whether we are to go into the whole proceedings of Mr. Burr, throughout the course of his life? Why should we go out of the Statute book? Why take confessions made out of Court?

War is constituted by a fact, or facts. If the war be made out by fact, every part of testimony which goes to establish, or prove that fact, is admissible; but, every part which does not, is extraneous. I go not into enquiry about enlistment, officering, arming, and the like—that I shall leave to the other gentlemen; but I ask for testimony to prove such things—or war has not commenced, and no act of Treason has been committed in the country. The intention of levying war, cannot make the act of levying of war. Wherefore, then, do gentlemen examine evidence of the intention to commit a crime? I am aware, that we shall be again asked—Why do we attempt to escape enquiry? We do not; but we want it to progress as it ought to do.

Mr. Botts then quoted the Constitutional definition of Treason, as expressed in the 3d act, and also in the 8th act of amendments. What, he asked, was meant by this? Was it, that, if one half of the crime of Treason was to be found in this district, you were to look for the other half elsewhere? No. The Grand Jury's oath restricted them to enquire for offences *committed within the district.* As half an offence was not a whole one; and, as Grand Jurors were not to enquire for offences committed out of the district; so, also, it would be improper to expect, that previous *declarations*, as stated in this affidavit, *made out of the district*, should be applied as good evidence of facts, said to be committed within the district. What is intention? It is not necessarily made to last. A person might intend to carry a thing into effect, but many things might operate to prevent it, Shall a declaration of intention, then, be ever received as evidence of guilt?

It is a general maxim of jurisprudence, and headed by a Constitutional regulation, that no man shall be subject to jeopardy of his life twice for the same crime. But we find Mr. Burr hunted from State to State; tried and acquitted; and so is he tormented with continual perplexities. But, Sir, are not these acquittals to be held in bar at any future time, for the same offence? In Blackstone's Commentaries, 4th vol. p. 303; and in Tucker's Blackstone, appendix, 49 and 50, are cases to prove the necessity of a trial being held in the same State, where the alledged crime was committed. Further: we produce an authority to prove what is levying of war. It is not only planning of a war within the country, but a co-operating in that war; (see East's Crown Law, p. 96.) Now, levying of

war, to compose the act of Treason, must have two witnesses to one overt act. This is peculiar to our Constitution. In England, it required two witnesses to prove the Treason, but one might prove one act of Treason, and the other another again. It is not barely that two witnesses are required to prove the same overt act, but the same overt *act of Treason*. There must be *an act*, as before observed, Intention will not be sufficient; for that cannot constitute "levying of war." But what, Sir, is this affidavit? Does it import any thing? If it does, it imports a declaration or confession, and that is all. Now, declaration nor confession does not compose any ingredient of an overt act, unless that confession be made "in open Court." This was a happy provision, to guard a man against the malice of an enemy.

In Blackstone, p. 536, are reasons given, why such kind of testimony ought to be required; and here we find the subject of such an affidavit as this brought into view. The quality of the evidence is a necessary examination, that a closet, or a corner-witness, should not be allowed to perjure himself at pleasure.

With these views we rest, having given our ideas of the nature of the proof, and of the amount of it, that should constitute the crime charged. Before we go any farther in the testimony, we presume we have proved that you must first be satisfied that the overt act of Treason was committed, and that by the testimony of two witnesses to the same act: and further, that Mr. Burr was the person that, not only contemplated, or intended, but actually committed it,—And not only all this, but that Mr. Burr did commit the overt act within this district where he is to be tried.

Mr. WICKHAM observed, that the course which the Counsel for Mr. Burr had marked out to themselves, was strictly within the letter of the law. Now, as to what a man has heard from a man who did see, or hear certain things, it was no testimony. As to General Wilkinson's affidavit, we are not afraid, in point of fact, that the Court should see it. But we object to the Court seeing it, upon these two grounds. First—We wish to ascertain the principle, whether affidavits are to be read as evidence, at all? Secondly—Will they be the same as though the man was on the spot? I presume not. Mr. Burr has a right to expect Gen. Wilkinson to face him in this Court; he is here ready to confront him, and his testimony; and not let him tell his own tale in his own way. Again: this affidavit, it was declared by the Supreme Court, in the case of Swartwout, did not contain any overt act of Treason, at all; and, therefore, he was discharged. Thirdly—It does not relate one single circumstance of any act done by Mr. Burr in Virginia. In Virginia, do I say? It does not relate any act done any where. Then, how can it prove an overt act? Fourthly—He speaks of a letter of Col. Burr; but he does not say what are its contents. As well at he can make it out, it is so and so. Where is this letter? Where is the key to it? Will this paper be read to them, with all these mysteries attached to it? I trust not.

Mr. HAY recommended to the gentlemen to have patience, and wait until all the testimony was gone through. They might feel more satisfied of the facts then. What did they know of the facts that could be proved?

Mr. E. RANDOLPH. We do not know what they mean to prove. But, Sir, is that a reason that, to what we do know, we are to give no answer? Are we to be admitting, before hand, that after what they say, there must follow an overt act? By the Bill of Rights, a man has a right to be confronted with the witnesses against him. But how is it here? Instead of a witness, which was attainable, here is his affidavit to be confronted with! Let us have the substance, Sir; and let us not be sacrificed to a shadow of testimony.

Judge MARSHAL. There is certainly a clear distinction between the testimony to be received in examination, on a motion to commit, and when the party is on trial. This is not testimony on trial: this is on a motion to commit. It has been said, and well said, that upon a motion of this kind, any affidavit might be produced as testimony. The Supreme Court held it as an opinion, that no possible injury could result from a plain affidavit being introduced; and, therefore, that affidavit, so far as it related to the case then before them, was admitted, and sanctioned by the Court.

This affidavit has been objected, as being inapplicable to the present case. The Court stated, that, unless the Treason was established, no testimony was admissible, which did not lead to the case before proven. First establish the Treason, and then go into whatever testimony might relate thereto. The Court did depend upon it, that gentlemen would have respected their opinion; they did suppose, that, had this course been followed, it would save a great number of questions.

But it is observable, that this affidavit relates to conversations with other persons—and of other persons; and also, to a letter; which letter, connected with the testimony that was than laid before the Court, did not prove any treasonable design. Unless, then, there should be other testimony of the same nature and tendency, this, alone, cannot be evidence before the Court; taken by itself, the Court have declared, that it does not contain any evidence of a treasonable design, which it must be brought to prove, before it can be admitted in the light proposed.

Mr. HAY. I feel much embarrassment at the situation into which I am brought by this decision. On the one hand, I feel a strong reluctance to do my duty; on the other, from the sense of that duty, a strong desire to proceed, which I must do in that way which my judgment shall point out to me, as the most proper, towards bringing this case to an issue; which I certainly could do, if not checked by the interruption of the Counsel on the other side; and if permitted to take the course which the testimony itself points out, which could not fail of approbation.

Admitting, Sir, that the affidavit of General Wilkinson, when taken by itself, would not prove the treasonable design; yet the re-

sult would prove to manifestation, the propriety of now reading it, Mr. Swartwout and Mr. Bollman being both in Court. What, Sir, is the object which this Court, and the United States, have in view? The only object is, to know whether Mr. Burr should be bound to answer such an indictment as may be presented to the Grand Jury. It really seems to me that their only object is, by dint of long speeches, and numerous objections, to bring us to their own terms, and believe that I am not mistaken. I may be, and I believe, that the evidence which is now before the Court, will be a satisfactory proof of the overt act, and of the treasonable design. Why, then, shall we not be permitted to go on? And, if the gentlemen please, without one single word.

Court. This is not applicable to the case; because, without the letter, it only relates to conversations; and, as such, cannot be read.

Mr. WICKHAM. As to retarding the proceedings, or entangling the testimony, or in any way impeding, the contrary is our most sincere wish. We want not to dictate, but we want the Counsel to go through the testimony to be given, according to law. If he wishes to break the rule of evidence, we must say (and is it strange that we should say?) we must stop him. I hope that every testimony of the intention of any act of Mr. Burr or any other individual will be received. Until the overt act is proved, or something that we are satisfied will lead to it, we must request that the Court will enforce the law of evidence.

Mr. BURR. In point of fact, I care not whether that paper be read or not. In deciding of this case, if any circumstance should occur to make it necessary to take notice of this affidavit, they ought to be at liberty so to do, if they see proper.

Mr. HAY. This paper relates to the design. Now, Sir, if we prove that the design was to take New Orleans, by embodying forces by land and by sea for its investment, what can better prove the overt act?

Court. Is it not well to shew this first?

Mr. HAY. If we suffer this once to be done, we shall be stopped at the threshhold of every argument, and of every piece of evidence, until they choose to let us go on.

Judge MARSHAL. The Court has no wish to narrow the limits of the prosecution. They principally wish to recommend the Counsel not to offer any evidence that is not applicable. That the fact should be proved in some way or other, is clear; and that the parties cannot all come here, is clear. There must, to be sure, be a beginning, or there never will be any progress made. If the fact is once proved, this may be taken by way of corroboration.

Mr. HAY. Am I, then, to prove the fact first, and then the intention? I am certain, Sir, that if we are called upon to prove the fact first, that the whole time of the Court will be taken up, and we shall *never* be able to get at the design. What are we to do? Will the Court say that any part of the evidence that we shall bring

is not material? I know, Sir, that taken by itself, this affidavit is not of importance: I also know that it is impossible to produce the whole scene to view at once. But, Sir, this is our very reason for wishing to prove the design first, and then the fact.

Mr. WICKHAM. The Counsel on the other side thinks it wholly immaterial at which end he begins: he will permit us, however, to think as well as himself; we shall expect him to proceed by the rules of law, and that cannot be denominated a waste of time. Suppose there were volumes of evidence to prove the intention of Mr. Burr—all without the fact, would be ineffectual. Let him begin at the right end, and prove the fact of Treason, and we shall not interrupt him.

Mr. HAY then called Peter Taylor, a gardener, and Jacob Albright, a labourer of Mr. Blennerhasset's, who gave their testimony. A letter in cypher, and partly in German, was produced, and placed in the hands of two sworn translators.

The next evidence was an affidavit of Jacob Dunbaugh, a Sergeant in the army, sworn before B. Cenas, April 15th, accompanied by certificates—first of Governor Claiborne, that a B. Cenas is a Magistrate in New Orleans. This was given on the 16th of April; and also a certificate by the Secretary of State, that W. C. C. Claiborne is Governor of New-Orleans.

This testimony was objected to from the want of form in the deposition. Because, first, the caption of New-Orleans, to wit, was not inserted to the instrument. And because, second, it did not appear unequivocally, that this was the B. Cenas who was a Magistrate at New-Orleans.

THURSDAY, May 28, 1807.

On the part of the United States, a paper purporting to be an affidavit, has been offered in evidence, to the reading of which two exceptions are taken:

1st. That an affidavit ought not to be admitted, where the personal attendance of the witness could have been obtained:

2dly. That this paper is not so authenticaced as to entitle itself to be considered as an affidavit.

That a Magistrate may commit upon affidavits, has been decided in the Supreme Court of the United States, though not without hesitation. The presence of the witness to be examined by the committing Justice, confronted with the accused, is certainly to be desired, and ought to be obtained, unless considerable inconvenience and difficulty exists in procuring his attendance. An *ex parte* affidavit, shaped perhaps by the person pressing the prosecution, will always be viewed with some suspicion, and acted upon with some caution: but the Court thought it would be going too far to reject it altogether. If it was obvious that the attendance of the

witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided.

But the particular case before the Court does not appear to be of this description. The witness resides at a great distance: and there is no evidence that the materiality of his testimony was known to the prosecutors, or to the Executive, in time to have directed his attendance. It is true that general instructions, which would apply to any individual, might have been sent; and the attendance of this or any material witness, obtained under those instructions; but it would be requiring too much to say, that the omission to do this, ought to exclude an affidavit. This exception therefore will not prevail.

The 2d is, that the paper is not so authenticated, as to be introduced as testimony on a question, which concerns the liberty of a citizen.

This objection is founded on two omissions in the certificate: The first is, that the place at which the affidavit was taken, does not appear.

The second, that the certificate of the Governor does not state the person who administered the oath to be a Magistrate, but goes no farther than to say, that a person of that name was a Magistrate. That, for aught appearing to the Court, this oath may, or may not in point of fact, have been legally administered, must be conceded.

The place where the oath was administered, not having been stated, it may have been administered where the Magistrate had no jurisdiction, and yet the certificate be perfectly true. Of consequence, there is no evidence before the Court, that the Magistrate had power to administer the oath, and was acting in his judicial capacity.

The effect of testimony may often be doubtful, and Courts must exercise their best judgement in the case; but, of the verity of the paper, there ought never to be a doubt. No paper—writing ought to gain admittance into a Court of Justice as testimony, unless it possesses those solemnities which the law requires. Its authentication must not rest upon probability, but must be as complete as the nature of the case admits of. This is believed to be a clear, legal principle. In conformity with it, is, as the Court conceives, the practice of England and of this country, as is attested by the books of forms; and no case is recollected in which a contrary principle has been recognized. This principle is in some degree illustrated by the doctrine with respect to all Courts of a limited jurisdiction. Their proceedings are erroneous, if their jurisdiction be not conclusively shown. They derive no validity from the strongest probability that they had jurisdiction in the case, and none certainly from the presumption that being a Court, an usurpation of jurisdiction will not be presumed. The reasoning applies in full force to the actions of a Magistrate, whose jurisdiction is local. Thus, in the case of a warrant, it is expressly declared, that the place where it was made,

ought to appear. The attempt to remedy this defect by comparing the dates of the certificates given by the Magistrate, with that given by the Governor, cannot succeed. The answer given at bar to this argument is conclusive. The certificate wants those circumstances which would make it testimony, and without them no part of it can be regarded.

The second objection is equally fatal. The Governor has certified, that a man of the same name with the person who has administered the oath, is a Magistrate, but not that the person who has administered it, is a Magistrate.

It is too obvious to be controverted, that there may be two or more persons of the same name; and, consequently, to produce that certainty which the case readily admits of, the certificate of the Governor ought to have applied to the individual who administered the oath. The propriety of this certainty and precision in a certificate, which is to authenticate any affidavit to be introduced into a Court of Justice, is so generally admitted, that I do not recollect a single instance in which the principle has been departed from.

It has been said, that it ought to appear, that there are two persons of the same name, or the Court will not presume such to be the fact. The Court presumes nothing. It may or may not be the fact, and the Court cannot presume that it is not. The argument grounds upon the idea, that an instrument is to be disproved by him who objects to it, not that it is to be proved by him who offers it. Nothing can be more repugnant to the established usage of Courts.

How is it to be proved that there two persons of the name of Cenas in the territory of Orleans? If, with a knowledge of several weeks, perhaps months, that this prosecution was to be carried on, the Executive ought not to be required to produce this witness; ought the prisoner to be required, with the notice of a few hours, to prove, that two persons of the same name, reside in New-Orleans?

It has been repeatedly urged that a difference exists between the strictness of law which would be applicable to a trial in chief, and that which is applicable to a motion to commit for trial.

Of the reality of this distinction, the present controversy affords conclusive proof. At a trial in chief, the accused possesses the valuable privilege of being confronted with his accusors. But there must be some limit to this relaxation; and it appears not to have extended so far as (to the admission of a paper, purporting to be an affidavit, and not shewn) to be one.

When it is asked, whether every man does not believe that this affidavit was really taken before a Magistrate, (it is at once answered that this cannot effect the case.) Should a man of probity declare a certain fact within his own knowledge, he would be credited by all who knew him; but his declaration could not be received as testimony by the Judge, who firmly believed him. So a man might be

believed to be guilty of a crime; but a Jury could not convict him, unless the testimony proved him to be guilty of it. This judicial disbelief of a probable circumstance, does not establish a wide interval between common law and common sense. It is believed, in this respect, to show their intimate union.

The argument goes to this—that the paper shall be received and acted upon as an affidavit; not because the oath appears to have been administered according to law, but because it is probable that it was so administered.

This point seems to have been decided by the Constitution:

"The right of the people," says that instrument, "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the person or things to be seized."

The cause of seizure is not to be supported by a probable oath, or an oath that was probably taken, but by oath absolutely taken.

This oath must be a legal oath; and if it must be a legal oath, it must legally appear to the Court to be so. This provision is not made for a final trial; it is made for the very case now under consideration. In the cool and temperate moments of reflection, undisturbed by that whirlwind of passion with which, in those party conflicts which most generally produce acts or accusations of Treason, the human judgment is sometimes overthrown, the people of America have believed the power even of commitment to be capable of much oppression in its execution, to be placed without restriction, even in the hands of the national legislature. Shall a Judge disregard those barriers which the nation has deemed it proper to erect?

The interest which the people have in this prosecution, has been stated; but, it is firmly believed, that the best and true interest of the people is to be found in a rigid adherence to those rules, which preserve the fairness of criminal prosecutions in every stage.

If this was a case to be decided by principle alone, the Court would certainly not receive this paper. But if the point is settled by decisions, they must be conformed to.

It has been said to be settled in the Supreme Court of the United States, by admitting the affidavit of Wilkinson, (to which an exception was taken, because it did not appear that the Magistrate had taken the oaths, and he was found acting) it must be presumed that this prerequisite was complied with; that is, that his acting as a Magistrate under his commission, was evidence that he was authorised so to act.

It will not be denied that there is much strength in the argument; but the cases do not appear to be precisely parallel.

The certificate, that he is a Magistrate, and that full faith is due to his oath, implies, that he has been qualified; if his qualification is

necessary to his being a complete Magistrate, whose acts are entitled to full faith and credit.

It is not usual for a particular certificate that a Magistrate has been qualified to accompany his official acts.

There is no record of his qualification, and no particular testimonial of it could certainly be obtained.

These observations do not apply to the objections which exist.

But it is said that the certificate is the same with that in Wilkinson's affidavit.

If this objection had been taken and overruled, it would have ended the question. But it was not taken, so far as is now recollected, and does not appear to have been noticed. A defeat, if it be one, which was not observed, cannot be cured by being passed over in silence.

The case in Washington was a civil case, and turned upon the point, that no form of the commission was prescribed; and, consequently, that it was not necessary to appear on the face of it, that it was directed to Magistrates.

That it was the duty of the Clerk to direct it to Magistrates, and he should not be presumed to have neglected his duty, in a case in which his performance of it, need not appear on the face of the instrument.

That the person intending to take this exception, ought to have taken it sooner, and not surprise the opposite party, when it was too late to correct it.

But the great difference is, that the privy examination was a mere ministerial act—the administering an oath is a judicial act.

The Court is of opinion, that the paper purporting to be an affidavit made by Dunbaugh, cannot be read, because it does not appear to be an oath.

Mr. HAY. It is uncertain how long this trial may last; it may be ten days; it may be much longer. But how long soever, Mr. Burr stands perfectly at liberty. It is my wish, Sir, that Mr. Burr might be placed in the custody of the Court, so that his attendance, from day to day, might be ensured. I am strengthened in this wish, by a letter which I hold in my hand, from the Secretary of War, announcing that it is pretty certain that General Wilkinson will be here about the 28th, or 30th, at farthest. I am unwilling to announce any thing that might weaken the confidence of the Counsel of Mr. Burr; but I give notice, that, if the case is not concluded this day, I shall, before the adjournment of the Court, expect that bail will be given to secure his appearance. I now consider him in the custody of the Court, and it is their duty to bind him over. I was hitherto easy about it; but now I consider it precisely as though a warrant had issued; and, by virtue thereof, he had been brought into Court. This practice was used during the former examination, and I hope it will now.

Mr. WICKHAM. The gentleman supposes by this, that he has

already obtained the effect of his motion for examination to commit. I hope he does not wish to commit Mr. Burr without bail or mainprize during the trial.

Luther Martin, Esq. (Counsel for Mr. Burr). By the former recognizance, Sir, I understand Mr. Burr is answerable in 10,000 dollars, to any charge that may be made against him at this term. Gen. Wilkinson's affidavit, as has been acknowledged, does not in the least indicate treason.—Then why should the probability of his arriving, make Mr. Burr's appearence to answer, more doubtful?

Mr. E. Randolph. The original motion was, whether there was probable cause to commit for Treason. Now, the motion appears to be to commit; because some time since, probable cause *may* be made to appear. Was there ever such an example exhibited? We have repeatedly asked for precedents, but they have none to warrant any motion which they have made. If they have testimony, let it come; if they have not, let them candidly confess it.

Mr. M'Rae (Assistant Counsel to Mr. Hay.) Gentlemen seem to say, that the recognizance already entered into, is a sufficient security that he will appear to answer every charge, and not withdraw himself under any circumstances whatever; but, Sir, with the Attorney of the United States, I have not that confidence in Mr. Burr, under every aspect of the case. He was held to bail in the former appearance; but remember, it was observed by the Chief Justice, that (although only charged with a misdemeanor) he was held to bail in a smaller sum than he would have been, had he been in the circle of his friends. And now, a crime at that time out of view, of greater magnitude, is charged, and witnesses present and at hand, to support that charge—which must prove the reasonableness of the motion to require an adequate security.

Mr. Wirt contended, that this motion was not in effect the same as the other. The other was to express an opinion, and to commit upon probable cause being shewn; but this is to bind him to answer to the verdict of a Jury. Again, gentlemen are wrong when they refer to the other recognizance. That only bound Mr. Burr under a penalty to appear to answer to the charge of misdemeanor; and if that charge was made, he would be bound to answer it accordingly. But, by this motion, he is held by the Court, who has the power of committing him, to answer to the charge of Treason. It is the same as though the examination was to be held in the chamber of the Judge, If it was so held, and the examination should take more than one day, would the Judge, in whose custody he would be, let him go every night? No, Sir, he would require bail for his appearance the next day. We know it would be so, because it was so done before. Then, I say, that if the prisoner was to abscond, he would forfeit nothing but the bond for his appearance to answer for misdemeanor. But, Sir, if probable cause should be shewn to indict for High Treason, would you not commit him, or otherwise bind and secure his attendance, by

original bail to recognize him from day to day to await the verdict?

Mr. Botts. The principle laid down is, that although there was an examination into the probable cause of indictment for Treason, that yet the examination might be renewed as often as the Attorney pleases. But, Sir, look at the result of this: the moment you refuse to commit Mr. Burr for Treason upon what you have heard, that moment their appears to your view a second, and then on to a third edition to this volume of evidence: so that the overruling of one motion will not preclude a renewal upon other grounds: and thus Mr. Burr is kept perpetually answering motion after motion. But, Sir, you have issued no warrant to apprehend Mr. Burr. There is no cause yet assigned why he should be apprehended. There was, in old times, a pratice in vogue, that when a woman was suspected to be a witch, to drown her, in order to find out whether she was so or not: and so, you want to commit Col. Burr for Treason, before you know whether or not there is probable cause of suspecting his guilt. If an Attorney possesses this power, he may become the engine of oppression to every person that he chooses to suspect of a crime; commit, and at his leisure examine the cause.

Mr. Hay. Mr. Burr stands here charged with having committed Treason, and such being the case, I could not have conceived that so plain a principle would have been so much controverted. The charge is of the highest nature: a charge that affects the property, reputation, and life of a man. This case has commanded universal attention: the business of this examination cannot be completed in one, nor in many days. Now, Sir, suppose the doctrine of the gentleman to be correct, and this security shall not be deemed necessary, and yet the Judges are convinced of the probable cause: suppose the accuser should, notwithstanding, neglect to ask other security for appearance to trial, and the accused should escape: Would not this be a source of universal derision? Would he not be laughed at, and scorned throughout the United States? This, Sir, is a matter of vast importance and interest to the people at large: they have already incurred an immense expence; every thing is in as great forwardness as possible, to proceed in the case. On the arrival of our witnesses, the Bill will be handed to the Grand Jury; he will be charged, not only with misdemeanor, but with Treason. Suppose General Wilkinson should arrive, and Mr. Burr should apprehend himself in danger, (and what is in his heart we know not) will he hesitate to preserve his life by flight, merely upon the penalty of 10,000 dollars? May it not be said to him—"We are about to decide on your case; it might be fatal to you: but you are at liberty to do as you please"? Sir, in all cases it is usual to be secure, and upon certain grounds. Why, then, should we not be, as it respects this man? Will gentlemen excuse me when I ask them whether they can seriously suppose that all the rules and measures which were taken to operate upon other men, ought to be relaxed

or modified, when they are called to bear upon Aaron Burr? I see no reason why he should have this peculiar advantage over other men like situated; why he should ask for more than the meanest of those individuals which he has brought into difficulty and danger.

But, there is another reason urged why we are not to require bail—because he has committed another crime for which he has given bail! But does this ameliorate his case, because he is guilty of a smaller crime, that he should not be tried or secured for the greater? In that case the imprisonment may be three days or three years—the fine may be three dollars or three thousand dollars. Suppose the terms should be made the most easy to him, after conviction; or suppose he runs hazard of the greatest, what is that to the hazard of his life? Forfeiture of money, or of liberty, is nothing, to forfeiture of life. No man would hazard his life, if he believed it to be in jeopardy, for a small sum, if he could escape unhurt.

Judge MARSHAL. It is the interest of the Court to decide in this, as it would be in every other case. When application was first made, bail was required. The Judge examined the testimony, and thought that there was not probable cause to commit for Treason; but, that there was probable cause to receive Bail for misdemeanor. Under this impression, bail was not required to that amount which it would have been, had the impression of the Judge been, that the other crime was committed. It was, therefore, thought that 10,000 dollars was as high as circumstances pointed out to be necessary. But, certainly, this recognizance, for a misdemeanor, was not thought to be sufficient to cover both the other alledged crimes; as this also, or a larger sum, would have been required, except that sum should be considered enough to cover both.

If, then, in a view of the testimony, there should probable cause be afforded, it would undoubtedly be the duty of the Court to take cognizance of it, and judge whether the person ought to be committed or not, or what amount of security ought to be given. But the testimony is not gone through; the Court, therefore, stands in a peculiarly critical situation: they know not whether there is probable cause or not.

Now, the case differs from what it would be out of Court. Out of Court it would not be known what was the charge against him, and the Judge would proceed to decide upon the crime by the evidence; but, whilst the party hears all that is going forward in Court, there seems to be a stronger reason to take measures with caution. The situation of the Court is delicate: it is not in the power of the Court to refuse to determine a motion when made to it, and yet there is an impropriety in this case for them to act and deliver an opinion. Sppose the Court determine upon the fact and the law—this fact and this law will go befare the Grand

Jury: now, if there is a probability of its going before the Grand Jury this term, the Court sees good cause to suspend its opinion; because it seems to involve an opinion on the fact, when that opinion cannot be given for want of evidence. Nothing but absolute necessity could incline the Court to give an opinion upon it.

In the state of things which now appear, the Court is exceedingly inclined to increase the bail under which Mr. Burr is held: but, to increase it under the situation which now appears, it would not do, without its being considered to involve no sort of opinion as to the probable cause; and, also, because of the effect which it might be suspected to have in the future progress of the case.

Mr. HAY. Certainly, we do not expect it. In fact, if Col. Burr should give security in an adequate sum to attend from day to day, we will be content to wave the subject for the present; and if Gen. Wilkinson should arrive, then the cause may go up to the Grand Jury without any previous examination.

Mr. BURR. I shall not admit of the necessity of bail. I shall forever deny it, because I find myself supported by the Constitution, which says "No person shall be arrested, but upon probable cause made out by affidavit." Then, Sir, I am not arrested; and they cannot arrest my person unless they should prove, upon affidavit, that there is probable cause. I cannot be called up until I am arrested; and I cannot be arrested without a warrant, when I shall have a right to demand bail; when the Court will have a right to hear what can be said upon the subject. However, Sir, it is my wish to relieve the Court from the embarrassed state in which they evidently are: I will do any thing to relief them, in my power. I will enquire, and in a short time shall be able to say whether I can give such bail as will be satisfactory. At the same time I deny the legal necessity of it.

Mr. BURR said that, of his own fortune, so much had been wrecked and torn from him, he could not calculate upon procuring bail to the amount of a dollar, either here or any where else. What might be expected, therefore, was of friendship. He mentioned the sum of 10,000 dollars which was accepted. Mr. Hay however thought 50,000 dollars more proper.

Messrs. W. Langburn, T. Taylor, John G. Gamble, and Luther Martin, were accordingly received as security in the sum of 2,500 dollars each, for his daily appearance. This, with the former bail, made the whole security to be 20,000 dollars, and a like sum himself.

MONDAY, June 1, 1807.

On the meeting of the Court, Mr. Hay observed, that he had not yet heard any more of Gen. Wilkinson. He had, however, got the return of a number of subpœnas having been served on persons in Chilicothe, who he expected might be here by Wednesday. His wish was, that the Grand Jury would continue their

very great patience. But in the present state of expectation, he was unwilling to go into the case.

TUESDAY, June 2, 1807.

General Wilkinson not yet arrived—No business done to-day.

WEDNESDAY, June 3.

Nothing was done or said this day but calculations and surmisings respecting the delay of General Wilkinson. On the part of the prosecution, it was suggested, that, if he preferred travelling on horseback (the only possible mode of travelling by land) from N. Orleans to this place, to that hazardous and uncertain one of the water, he could not be here for ten or twelve days yet to come. The distance is 1370 miles; allowing 30 miles a day for continuation, and all hazard, it would take from the 4th of May till the 18th of June to complete it. He could not, from any knowledge which had yet come, have started until about the 4th of May. It was suggested, therefore, as an adviseable step, to adjourn the Grand Jury for about 15 days, which would relieve them from their present daily attendance, and afford a better prospect of proceeding; since it was desirous, for various reasons, (the witnesses being nearly all here at a considerable expence) to conclude the business at all events, during the present term.

Mr. BURR, and his Counsel, contended—that, if due measures had been taken, General Wilkinson might have been here; that delay was, to them, very disagreeable, as they had witnesses attending; that if the Grand Jury went to their homes, perhaps some unfortunate or pecuniary circumstance might detain some one of them from the requisite punctuality of returning. These, and many other circumstances, rendered any delay unpleasant.

The Court signified their acquiescence in whatever might be the pleasure of the parties; as also did the Grand Jury, whose will was consulted. Uultimately, the Court proposed an adjournment of the Grand Jury to Tuesday the 9th inst. at 2 o'cock, in which all parties acquiesed.

Mr. HAY said, he was very certain that Gen. W. was on the road, and that nothing but death could prevent his arrival with every reasonable expedition.

TUESDAY, June 9.

The Grand Jury appeared, agreeably to their adjournment.

Mr. HAY rose, and signified to the Court, the extreme regret he felt at uot being able to give any farther information, relating to General Wilkinson, than heretofore. He produced an article, taken from a Norfolk paper, which stated the arrival there of a vessel, in 27 days from New-Orleans; a gentleman who came passenger in which vessel, was in company with General Wilkinson on the 12th of May, and that then there appeared to be no preparations making by him for a journey. It was, therefore, Mr. Hay said, most probable, that the messenger had not then arrived; for, he was well

assured, and the affidavit produced some days ago, corroborated that opinion, that General Wilkinson *was* holding himself in readiness to obey, instantly, any order from the Government, which might be given. On these grounds he wished a short postponement; which, if it extended to Saturday next, might give opportunity to some additional information.

Mr. MARTIN produced a corroboration of the above fact. Saturday having been objected to by Mr. Burr's Counsel, the Court adjourned the Grand Jury to Thursday.

Mr. BURR desired that the Court would take measures for the production of certain papers, which might be very serviceable to him in the further prosecution of this case. One was a letter received by the President of the United States from General Wilkinson, dated October 21, of which he had spoken in his communication, made to both Houses of Congress last session. The others were, the orders issued from the War and Navy Departments, by order of the Government, for the apprehension and destruction of certain persons, and arresting certain measures, supposed to be transacting at, and about the Mississippi Territory: which orders were issued in the months of November and December, and, perhaps, January last. The orders from the Navy Department he had seen: they were, to destroy him and the persons with him, and sieze the property. The evident necessity of these papers had induced him to apply to the Secretary of the Navy, while in Washington, who unhesitatingly declared, that if he would get one of his Counsel to write, he should be provided with a copy. This he had procured to be done; but the Secretary had altered his mind, and refused what he before had promised. Now, how to procure those papers, but by application to the Court, and from the Court to those Departments, he knew not; and, as to the letter of Gen. Wilkinson, he could see no order which could be taken, but by subpœnæing the President. However, as to that, he should have no objection to save the trouble, if the papers could be obtained.

Mr. E. RANDOLPH said, he had, at the suggestion of Mr. Burr, written a letter to Mr. Smith, Secretary of the Navy, requesting a copy of the order. In answer to which, Mr. Smith wrote, that the orders were given to the officers for whom they were particularly intended; and, therefore, they could not be sent. Col. Van Ness, who was here a short time ago, did say, that, to his knowledge, there was an absolute and unconditional promise on the part of Mr. Smith, to give a copy of the order, when called for. It has been seen, however, printed in the Natchez Gazette.

Mr. HAY did not know how the papers in question could operate on the case, or what part of it they would apply to, whether on the motion to commit, or on the trial. He supposed, as to the letter of General Wilkinson to the Executive, that the communication to Congress being in Court, the letter was included. Then, of what avail could a subpœna be. If, however, there were any papers of any description, which the gentlemen would name as useful to their

cause, he would pledge himself to exert every nerve to procure it; but, as he could see no possible bearing which those in question could have, he must require, that, in order, by every possible means, to save time, the papers should be put in possession of the Court; and, if they should think proper to submit any part of them to the Jury, as applicable to any part of the case, he should not object. He could see no object or cause for this motion, but as one of ten thousand that would be brought, he supposed, to distract, instead of inform.

The Court observed, that the motion being made now, might possibly save time; which, in a subsequent stage of the proceeding, might cause a delay. The production of the papers may be desirable; but, as to a subpœna, an argument might and would be necessary. How far it was right, and in what case a subpœna of this nature could be granted, the Court were undecided to say. It might depend on the efficacy of the testimony expected. If some manifest inconvenience would attend the party subpœnæd, then the nature of the paper required should be shewn. It was presumed, that the reason a subpœna was moved for, was, for fear the papers in question should be refused. Is the newspaper, in question, in Court?

Mr. BURR. It is not: but it has been seen by several gentlemen. We are prepared to go into the argument on the subpœna, and on the necessity of the papers.

Mr. MARTIN said, that no officer of the Government was wanted here, but the official papers were wanted.

Mr. E. RANDOLPH. The motion intended was, that, if Mr. Burr should find it necessary to obtain a subpœna, he might have the power to call for it. But, if arrangements could be made, to procure the papers, the motion would be waved.

Mr. HAY had not yet heard gentlemen say any thing of the materiality of these papers.

Mr. WICKHAM. The information which the Counsel have from Mr. Burr, gives ground to believe that they will be material. He thought it would be better to make the motion, and then let it undergo what modification might be thought proper. Copies only of the orders that had been given from the War and Navy Departments could be expected, the orlginals having been sent away; but, as to the letter of General Wilkinson, they wished to see the original, although no doubt could be entertained of the accuracy of the copy.—No doubt a fair copy would be sent. But, suppose General Wilkinson should come here, it will be necessary to meet him with his own hand-writing, a copy of which letter he might deny.

Mr. HAY. From these observations, he would retract every accommodation which he had proposed, and let the Counsel go on in their own way.

The Court supposed, that if the letter referred to was a document in the office of the Secretary of State, application to that Department might procure it.

Mr. WICKHAM supposed it was not deposited there, because General Wilkinson said it was in part personal, and in part confidential.

Mr. HAY. Then, if it is a private letter, how can the Court ask for it? They cannot compel any individual to exhibit private correspondence. As to the papers, he would exert himself; and even respecting that letter, to obtain them, as he had before said, if they were to be put into possession of the Court. As much time had already been spent, he would do any thing to haste towards a conclusion of this case, and he really hoped that gentlemen on the other side would join him.

Mr. E. RANDOLPH was as desirous of saving time as the gentleman; but if a little preliminary time was taken, it might tend to remove obstacles which, in going on, might be of magnitude. He did believe that, if the Court were in possession of those papers, what was now merely suggested and ideal, would be proved clear as the day.

Mr. BOTTS hoped, that the Court would say, that it was time for the numerous obstructions, which the defence had experienced, to be removed; and that they should have *liberty* to speak and proceed in that way which a case of this magnitude demanded; and not always be hearing from Mr. Hay about waste of time, delay, &c. when that gentleman himself rose to speak twelve times to any other person's once. If any gentleman attempted to answer him, then he talked about consumption of time. In a case of such importance; nay, in any criminal case, Mr. Botts said, this was the first time he had ever heard the Counsel for the accused charged with an unnecessary waste of time. He trusted that they were as tenacious of time as the Attorney; but the duty they had to perform, they were well aware of: and that duty, conscience bound them to execute to their utmost powers. He wished to end these complaints; which ought, with justice, to be retorted back upon the gentleman himself. It was his desire that the motion should be made, and the argument proceed.

Judge MARSHAL said, that if the Attorney was satisfied that the Court could issue a subpœna *duces tecum* to the President of the United States, there was no need of argument; but, if that was doubtful, and as the Court were not satisfied, not having thought upon the subject at all, they did not choose to take any step, either positively or negatively, on the motion; and were desirous of hearing the Counsel on both sides go into it.

Mr. HAY again repeated, that he was willing to obtain all the papers the gentlemen wanted, and should take suitable measures for that purpose.

Mr. BOTTS said, it would take four days to communicate with the Executive; besides which, two days would be required to make the necessary copies, and prepare them for sending, even if the Executive should be willing to send them: but suppose he should not be willing to send them? If he refuses, as has already

been done by one Department, then there will be a delay of six days; which, at this stage of the proceeding, might be of great importance.

The motion intended to be made was then read, and the Court decided to have argument thereupon to-morrow.

WEDNESDAY, June 10, 1807.

Mr. HAY informed the Court and Counsel, that in conformity to what he had said yesterday, he had written to the President of the United States, informing him of the motion that was about to be made, and soliciting that all the papers suggested might be sent; at the same time stating, that they would be reserved only for such uses as might appear to be necessary. An answer might be expected in five days inclusively, which would be before any discussion, if engaged in, could require it.

He was satisfied, however, that when the papers arrived, it would be found that they had been contending about nothing: it never can be important under any possible view of the case, if the question is rightly understood by me. I shall state to the Court, that it is my intention to propose a preliminary question, which respects the right of Mr. Burr appearing here as he does; but as it is not necessary, at this time, to discuss even preliminary topics, I shall be satisfied to wave it, if the gentlemen are willing to await the result of my application. So much time will be devoured, and to so little purpose, that I confess that I am very unwilling to enter into the discussion. I hope gentlemen will believe me, when I declare that there is not the least disinclination in the government to furnish every document in their power respecting this prosecution. After these declarations, I hope gentlemen will not press the question merely to display their talents or their zeal for the accused; if they do, they shall have an opportunity of doing it to their heart's content.

Mr. MARTIN. The gentlemen on the other side know how long the time of the Court they can, or will take up: we know not their intentions, however sensible we may be of their talents: but the gentleman has gone farther than he ought, when he expressed what our intentions are: it is enough for us to know them ourselves.

Mr. WICKHAM. We do not wish to bring the President of the United States here, unless he wishes to come: if he chooses not to come, all he will have to do, is to send us the paper which Mr. Hay says he is confident he will send. But, Sir, it is very possible Mr. Hay might be mistaken on this point. On the possibility of a refusal, it is, that we frame our motion. As to the display of talents and zeal, I suppose the gentleman will exhibit his proportion, as he has commonly done, and is very capable of doing. On the possibility of the government taking different steps from those so flatteringly anticipated by the gentleman, I must continue to express my wish that the process might issue; and that it may be considered,

that the produce of the letter in question shall be sufficient to render the personal attendance of the President unnecessary; and that the letter and other papers shall be put into the possession of the Court.

The Court decided, that the Counsel go on with their motion.

Mr. MARTIN rose to enquire, whether is was confined to the process for the attendance of the President of the United States as was yesterday suggested.

Judge MARSHAL. That is not all, but it respects the production of the papers also.

Mr. HAY observed, that he considered Mr. Burr as not standing before the Court in that situation which he ought to do: he was not authorized to make application to the Court for process at this time. This preliminary question he presumed to be in priority; and, if the gentleman wished to discuss it, it might supercede the other. He wished the papers to be stated to the Court.

Mr. MARTIN read the motion, and the affidavit of Mr. Burr. The latter is in the following words: (the motion was grounded thereupon.)

AARON BURR, *vs.* UNITED STATES. } *Circuit Court of the United States, 5th Circuit, and District of Virginia.*

AARON BURR maketh oath, that he hath great reason to believe that a letter from Gen. Wilkinson to the President of the United States, dated 21st. of October, 1807, as mentioned in the President's Message of the 22d January, 1807, to both Houses of Congress, together with the documents accompanying the said letter, and copy of the answer of said Thomas Jefferson, or of any one by his authority to the said letter, *may* be material in his defence in the prosecution against him.—And further, that he hath reason to believe, the military and naval orders given by the President of the United States, through the departments of War and of the Navy, to the officers of the army and navy, at, or near the New-Orleans stations, touching or concerning the said Burr, or his property, will also be material in his defence. AARON BURR.

Sworn in open Court, 10*th June*, 1807.

W. MARSHAL, Clk.

Mr. HAY. The motion which has been made by Mr. Burr, if I understand it, is—that a subpœna should be awarded by this Court for the purpose of forcing the attendance of the President of the United States, who is to bring with him the original letter, alledged to have been written by Gen. Wilkinson to him, and afterwards by him referred to in his communication to Congress. Now, Sir, I contend that this motion is premature: that Mr. Burr in the situation he occupies at this moment, is not authorized upon legal principles or propriety to require the interference of this Court to to obtain testimony (I will say) of any description. What is his situation? He was committed for a misdemeanor, and afterwards

recognized to appear here: he is now here, and only for the purpose of answering that recognizance. No bill has been found against him; none has yet been sent to the Grand Jury; all that can be said about it is, that he is here to answer any charges that may be exhibited against him. Thus situated, he applies for a subpœna; and what will be the consequence if the President does not attend here, if the process should issue? Why, an attachment may issue to force him to appear.

Now, Sir, I lay down this broad proposition; in order to shew that no person accused of a crime: has a right to apply to a Court to procure the attendance of witnesses by any process of that Court, *until he is on his trial:* and that is not until the Grand Jury have returned a true bill against him, and the prosecutor has announced his intention to proceed with the trial. If this is not correct, will gentlemen be pleased to point out that clause of the Constitution or laws, Common or Statute, or any thing which can encourage them to make this motion. They may search in vain, even amidst all the mazes and intricacies of the common law. The 8th amendment to the Constitution, is the only thing that comes near it; and that provision only relates to the period of trial, and not to any preliminary steps, previous even to a bill having been submitted. It never was intended to be applied to the time of arrest, transportation, or previous examination of an offender. The object of this provosion is, to secure to every man an impartial *trial:* but enquiry is not trial: a trial is the state of the case, when submitted to a Petit Jury, who pass upon the question of life or death. When the case arrives to this awful crisis, then the provision of the Constitution give a right to obtain compulsory process to obtain witnesses, and allows of Counsel for the defence. It is true, that even in this insipient state, there are Counsel: not two Counsel, as the Constitution provides on a state of trial; but here are four; and not only of this State, but the legal talents of another State have been engaged. It is also true, that he has had the benefit of subpœnas from the Clerk's office, to obtain the attendance of witnesses; but this was gratuitous in the Clerk; he was not obliged to furnish them; and, if he had failed or refused so to do, there could have been no official blame attached. Therefore, we infer, that this constitutional provision is not applicable at this stage of the case.

Now, Sir, let us suppose that the President was to come here with the letter in his pocket, what would be the consequence? He is called away from the business of his country, to which he is bound to attend.

Mr. WICKHAM. The question is, whether a subpœna *duces tecum* can be taken out or not; and, will operate upon these papers with the personal attendance of the President?

Mr. HAY. I know it, Sir: I was proceeding to shew the impropriety of this question in its premature situation. What will the gentleman do with the President after he comes here, not saying a word about the great inconvenience which his absence from the

seat of government might cause? He cannot answer this plain question. It can be answered by myself alone; because, if the trial does not come on, there can be no evidence whatever given. And, Sir, can the Court or Counsel, learned as they are, pretend to anticipate events? Can they say that Bills, or any Bill will be found by the Grand Jury? Will they say that the trial will take place? Will they even say that Bills will be given to the Grand Jury? There is reason, to be sure, to believe that it will take place; it surely will, if Gen. Wilkinson arrives, of which I have not the smallest doubt, from my recent information.

Another circumstance might be considered, and on which the prematurity of the application is evident. Can the Court, in this stage of the business, even allowing that the trial will take place, name the time *when* this witness shall be required to attend? Is there any record made on the subject of trial? If the day was named, and he should attend, however probable it might be, yet, it is not certain that he might be wanted even during the present session. Nay, the very language of the process, proves that no evidence can be called until the accused is put on his trial.

It might be said, that this testimony might be wanted, in case the motion to commit should be renewed. It certainly will be renewed if Gen. Wilkinson does not arrive. But there is no such motion before the Court; and if there was, the accused could have no claim upon process to compel his witnesses to attend: this Court possesses, in such a stage of the examination, no powers different from a committing Magistrate, who could not award process, because he has not the power to continue a motion. Sir, I ask yourself, whether, if such a circumstance was to occur in your chamber, and an application of this nature was to be made to you, would you order process to issue, such as is now asked for? I think I can answer that you would not: and if you would not there, why should it be asked of you here, when your powers are precisely the same? Witnesses do voluntarily attend in examination previous to commitment, to be sure. It is right, both upon principles of law and humanity. It is invariably the practice to hear any testimony that shall be produced by the accused to prove innocence as a reason why he should not be committed or recognized to trial. And is it not so in this case? Any testimony will be heard without opposition; but, that does not prove the propriety of issuing process to *compel* attendance on such examination. No instance, Sir, can be found in judicial proceedings, where a Magistrate has postponed the commitment of a person charged with a crime upon his declaration, that he has witnesses which, if heard, will clear him. They will be heard when they appear, and their not appearing, never can prevent the commitment or recognizance.

Before I sit down, I beg leave most seriously to declare, that my object is only to save time. I do verily believe, that the documents asked for, will be produced without the motion. But, Sir, how

came it about, that the materiality of these papers never was discovered until this moment? The existence of this letter has been announced long enough, and there is no doubt but the gentleman knew of it. Why then did the motion not appear sooner?

Mr. WICKHAM. I will not enquire whether the object of the gentleman is to save, or to gain time; every gentleman must draw his own conclusion upon that subject. Yesterday, notice was given, that this motion would be made, and the Court then agreed to hear argument upon it. The reason, Sir, that we did not make application to the Clerk of the Court for a subpœna in this case, as well as for others which have been taken out, is, that there could be no modification in any process he can issue: it only goes to command the personal attendance; but we wish to see the papers, and particularly the letters spoken of; and, therefore, lest the President should neglect to bring these papers, thinking them unnecessary, we wish the subpœna to express our desire that he should bring them. But we require not his personal attendance: all we want is, the original letter, and copies of the orders.

Sir, Mr. Hay has diminished the operation of the subpœnas granted by the Clerk, to nothing; they contain no compulsory process; and yet observe the importance he has attached to them. He has extended his doctrine so far as to say, that this accused man is to be brought before this Court, and yet cannot call for any process to release himself, by shewing his innocence. Will not the gentleman allow others the same latitude which he takes himself? We need only for our justification to refer to his practice, if *it* be right. Have not subpœna after subpœna been taken out by him in this case? Are not a great number of witnesses brought here, and who attend from day to day? And under what authority is this? It is under the authority of this Court, at his instance. And I would ask the gentleman, on what principle he can refuse the same to Mr. Burr? Is he to be bound hand and foot until he hears what witnesses Mr. Attorney will please to produce towards his conviction? Sir, every argument which goes to shew that *we* are not entitled to a subpœna, goes to shew that *they* are not; as we contend that we are equally entitled. We contend that we are entitled to the benefit of the Constitutional provision, to obtain witnesses to proceed to a fair and impartial trial, by requiring the process of the Court. Can so monstrous a doctrine be supported, as that Mr. Burr is not to examine a witness in his own behalf? It must be considered that he would have a right to call upon any man present to give testimony on his case: Then I must ask, what can be the reason on which a subpœna would be refused? Nay: is it not the practice of committing Magistrates to issue process for the attendance of witnesses to examine? It is, I will say; and I can see no reasonable ground upon which it can now be denied. And yet we are told there is no precedent.

Mr. WICKHAM here referred to the case of Smith and Ogden, in New-York, before the Circuit Court: Present—Judges Pater-

son and Talmage. Subpœnæs had been taken out before the indictment was found, commanding the attendance of Mr. Madison, General Dearborn, and some others residing at Washington; which were served on these persons, and their expences tendered: but, they refused to attend to the process. Accordingly, attachments were moved to issue for non-attendance. Arguments were heard: the excuse offered, was, that they were detained by command of the President upon executive business. Here no person doubted the reasonableness of the summons, or the power of the Court to summon. The question to the Court was, not about the subpœna, but on the motion for attachment. The subpœna was undoubtedly right. On the attachment, Judge Paterson thought it ought to go; but Judge Talmage thought it ought not. The Court being divided, it did not issue.

The gentleman says, that it is his pleasure whether to send up a bill or not. Granted. But suppose he does send up a bill, are we to be forced into a trial *instanter*. Yes, Sir, so it appears. He is to hear and examine what witnesses, and when he pleases, and we are to have *none* on our side. He says he can do as he pleases, and we are to await his motions and measures! We know not what *he* means to do—but, have *we* nothing to do? Sir, might not Mr. Burr come forward and move for his discharge from recognizance? Can the gentleman doubt that we shall do it? And, if we do so, have we not a right to every means that will strengthen our motion?

But, says the gentleman, to what day is this to be made returnable, even supposing, for a moment, that we have the right? Why here, to be sure, is a question, which we cannot answer; it remaining in the gentleman's own pleasure, and the law being silent as to the day. And so, because there is no statuary day for the return of a subpœna, none can issue! Strange, indeed! But, Sir, cannot the Court point out that day? Has it not been done during this Court? Is it not continually done? Sir, the Court know, and the gentleman knows, that nothing is more familiar in practice, than for the Court to examine convenience to all parties upon this subject.

But, we are told, that if a motion is made for commitment, we shall not even then be at liberty to move a continuance.

Mr. HAY explained: That his doctrine was, that if a Justice, or committing Magistrate, had an accused person before him, he could not award process in his behalf, because he could have no power to continue the motion.

Mr. WICKHAM. Admit it, for argument's sake; would not that operate as the very strongest reason possible, why we should now urge it? The Court would award process for the attendance of witnesses *instanter*, or name such day as convenience suited. We come here, stating the materiality of testimony, to prove our innocence; and shall we be refused? I trust not, Sir.

But, why did we not make our application sooner. Why, I never knew that it was too late to obtain justice. And yet, he says,

that we have no right to make it until the trial commences. There are but three periods; too soon—too late—or the right time. If we stay till the trial, it would be too late; if before this, and even this, is too soon; and yet, not soon enough! Now, the proper time is in the breast of the party himself; and we say, *this* is the proper time.

But, the gentleman says, Mr. Burr has four Counsel to assist him, and the law only admits of two. Sir, in turning to the laws of the United States, I find, that *one* person is to be appointed Attorney for every district; but, what do we see? We find here three gentlemen of eminent talents; and, they have liberty to have as many more as they please, and pay them out of the public treasury!

Mr. MARTIN said, it had been the practice in Maryland ever since his knowledge.

Mr. E. RANDOLPH said it was the same in Virginia.

After some desultory conversation, the Court directed the motion to go on.

Mr. MARTIN said, he should now rise, as he had attempted to do an hour ago, to shew, that there was nothing so dignified, so exalted, and so superlatively magnificent in the President of the United States, as to prevent a Court of Justice from calling upon him, to give testimony, as well as the poorest and meanest of his fellow-citizens in the community. As, probably, they will not believe me on this subject, I beg leave to refer to M'Nally's evidence, 1 vol. p. 285. If gentlemen can find one single case in all British precedents, that holds sacred from giving testimony this exalted man, they shall have all the benefit of it: but they cannot. It there appears, that the King of Great Britain is bound to give evidence when any of his subjects call for it. He is not bound to appear, to be sure, in Court; but, must give testimony under his signal manuel.

Court. We observed that Mr. Hay admitted, that the President might be subpœnaed.

Mr. MARTIN. I am very glad of it, please your Honors. It will save me many remarks and references which I intended to have made.

Then the next question will be, whether he might not be directed by a Court of Justice to produce certain papers; which papers, we believe, to be material to our defence. It is not material to us how they come; whether the President appears in person or not, so that we get them.

We have seen a case in point upon this subject: that of Ogden and Smith, at New-York. There the Secretaries and other officers did shelter themselves under the Presidential order: the excuse was, that they could not be spared from the seat of government. But, we see how the farce turned up; for, as soon as the trial was over, every officer of the government could be spared to go where he pleased! We may therefore safely presume, that the testimony

we want, is in the power of the President: we say it is material, and, as far as we can judge, it is kept back by him. We then apply to him as being superior to the Heads of the Departments, who are entirely under his controul; for if he should order the copies to be procured for us, it would, and must be done immediately.

One is an original letter written by Gen. Wilkinson, in October 21, to the President, and by him said to have been received on the 25th November last. The others are certain orders given to the Army and Navy of the United States respecting Mr. Burr's apprehension: of these we want the copies; they having been sworn to by Mr. Burr, as material to his defence also. It would have been supposed by me, that every citizen had a right to call upon either of those departments, and demand copies of any papers which they think materially concerned it, except such papers were of a nature to require their privacy. But, yet, we find that one of those papers has been refused to a gentleman (Mr. E. Randolph) although it was previously promised; and we may presume that it was refused under the direction of the President of the United States; because, it must be presumed, the officer, in such a case, would not refuse them.

Mr. E. RANDOLPH here explained the nature of the application and refusal.

Mr. MARTIN then went on to declare, that Mr. Burr had done nothing contrary to the laws of his country, and to the inherent principle of man, and self-defence; whilst the terrific charge of *Treason*, and these unprincipled orders ran with unparalleled velocity from one part of the United States to the other.

Sir, (said Mr. M.) how has the President farther acted upon this business? He has undertaken, in his communication to Congress, to prejudge the very case we are now engaged in. He has undertaken to say to my honorable client, that, "of his guilt there can be no question." He has, in his great zeal, presumed to go into the knowledge of that heart-searching Being who alone can know all things. And this presumptuous declaration is to be sent out into the world: he is to be proclaimed a Traitor to his country: which country has heretofore signalized him as worthy of their distinguished attention and regard. Sir, was not the *blood-hounds* of persecution set loose upon him in every direction where his footsteps could be traced? And now, at last, they seem to think that they have hunted him into their toiles; and all they have to do, is to make him their prey! Sir, I seriously ask, whether this high officer of the government (the President) has a right, or ought to keep back those papers which we prove to be of so great importance—so great as to affect the very life of my friend. Sir, I hold it to be a sacred principle, that when a person holds in possession, evidence intentionally, that would, if exposed to the defence, shew the innocence of the person accused, he is recorded in the register of *Heaven* as a *murderer*. But, Sir, can it be supposed that, because the President of the United States has held up to the world, the guilt of Col.

Burr, upon the slight evidence he possessed, he would rejoice in his downfall, or his execution?—That he would, to accomplish that purpose, keep back any evidence that might tend to exhibit the truth of his character, or the real object of his actions? No, Sir, he would not. Then, Sir, on reflection, will he refuse? Will he not rather say, "if Mr. Burr be a victim, let him not be a victim of malice, but of justice?"

In a case like this, where so much is at stake to the accused, I should have supposed that there would have been the utmost possible candor shewn on the part of the government. Would it not be right to say to the accused, "if we have any papers that you think will be of advantage to your defence, they are at your service; we wish to accommodate you with every thing in our power to prove your innocence." Sir, if this had been done, we should not have had occasion for this motion.

But, Sir, the gentleman seems to think, that it is only by way of excuse that we make this motion; that we can get no advantage by it; and, that the papers will do us no good if obtained. But, certainly, upon this doctrine, he must forget that it is not the practice of the President of the United States, the Heads of Departments, nor the learned Counsel that are to determine, whether this is testimony or not; or, whether it would be of service to us. No, that is the province of the honorable Court which I now address; it is their jurisdiction alone to say, whether this testimony will have any bearing or not in the case; and of that they can only speak, when they have seen it. We want nothing else; we ask nothing else; but give us an opportunity to see whether it will be of any service to us or not. But it seems as though they would not trust it in our possession, lest we should make some improper use of it; such as exciting public clamour, or something else; which, it must be presumed, they alone can point out; for I cannot imagine. Why, Sir, should they impute this disposition to us? I am sure I have heard it acknowledged, and I verily believe, that all the Counsel engaged in the defence (myself excepted, which becomes me to except) stand very high in the opinion of the public for integrity and candor. What reason is there to believe, that they have not as much honor and integrity, without derogation, as that illustrious character, the President of the United States? Will they say, that because he is President of the United States, he possesses a more immaculate and Godlike mind? If they say so, Sir, they must very highly have sinned against all former Presidents.

But they say that this letter might have been sent in confidence, and addressed to him in his private capacity. But of what avail is this? It can be no excuse. Now, suppose Gen. Wilkinson was here, and we had Mr. Jefferson here also, should we not call upon Mr. Jefferson to divulge even the contents of this letter, however private it might be? Would it not be sifted into, to know whether Gen. Wilkinson had not given a very different state-

ment to him, from what he might have given elsewhere, or from what he might give here orally?

Mr. Martin here referred to 2d Atkins, p. 524, and M'Nally, p. 239, to prove that there was no class of persons whatever, from whom evidence could not be obtained by compulsion; not even friendship, relationship, or secrets of any nature, except those revealed to Counsellors, or Solicitors. He quoted the Dutchess of Kingston's case, where even the Doctor who delivered her, was forced against his wishes to give evidence; and, even Lord Barrington himself, though he repeatedly intreated to be excused, was forced to prove her marriage; and this after a serious and mature deliberation of the Judges.

Then, Sir, (Mr. Martin continued) suppose this secret to have been lodged in the bosom of Thomas Jefferson, however confidential it might be, that can be no reason why he should not be called here to unfold the disclosure. Suppose the letter was addressed to him in his private capacity, will any gentleman say that we could not have summoned him here; and, after his being here, asked him to produce that letter, or declare its contents? Yes, Sir, it could be done, I presume, upon sound principles of law.

But we shall be told that we are making too free with the sacred character of this great man; and, that it would be Treason almost (and I verily believe that it would be as great a Treason as the one we have now under review) to suppose that he will not disclose the whole truth, when under oath. But will gentlemen remember that Gen. Wilkinson has already forfeited that solemn faith which he professed, and swore to keep inviolate to his country. Has he not trampled upon all the civil rights of his fellow citizens? Has he not prostrated civil authority at his feet, and established an hitherto unheard of military despotism on its ruins? Palliate his conduct, he cannot; much less retrieve his forfeited character. Justification is beyond his reach. It therefore, becomes to him, an all-important point, to fix *guilt* somewhere. And this man is excuseed for all his base conduct: a conduct reproachful in the extreme! And, Sir, is it not possible, that a man possessed with, and capable of this extravagantly illegal, and oppressive conduct, will swerve from the truth? Sir, there are men so abandoned in principle, and so determined to procure their own escape from justice, that they would take as much pleasure through faction, in seeing a man, whom they wanted to get out of their way, dangling on a gallows, as a philosopher can take in seeing a rat struggling for life in an air pump. Tucker 4. Bl. 41, append. says "faction, and factious men will regard nothing in competition to the interests of themselves or of their own party." And this doctrine is more and more evinced to us.

But, it is said, that if this is a public letter, or so much of it as relates to this case, a copy of it might do. I presume, Sir, this will be amply shewn to be a wrong position by some who will succeed me. I will barely observe, that it is the practice in the Courts

of Maryland, to obtain originals, if they can be had: because of the possibility of a mistake occurring in copying, or of a denial of its truth. And so where record is made, it is the practice to bring the original record back into Court, and not a copy, even in civil cases. It may, however, be said, that there is danger in trusting us with this letter. To obviate that, we will say, that there is no need of its coming into our hands, without the Court shall say it is necessary. But there is another remedy. An attested copy of it might be written before it comes to us, and filed accordingly. This is the practice in Courts of Chancery, where the originals are wanted in Court.

With respect to the orders which recommended the hunting and destruction of Mr. Burr, his property and adherents, copies will do; and, they are extremely necessary. If I understand what their import was, and what the overt act of Treason, charged upon Mr. Burr, consisted in, it will shew us, that, when an armed force was raised against him, under these certain orders, replete with his destruction, there was some intention in him to use force to defend himself. What do we farther want to see them for? Why, Sir, we think that they were given in violation of the Constitution; that there was no legal right, under the circumstances that then were known, to give these orders; that neither his life, liberty, nor property were secure under them; and that, therefore, instead of this act being criminal, in opposing a lawful force, it was nothing but for self-defence against measures that might have terminated in his destruction.

I do trust, Sir, that we shall hear nothing of the inconvenience of summoning the President. His appearance might be the only prop upon which this citizen may have to rest his innocence: he might be able to free him by his testimony. And surely, then, no inconvenience, whether public or private, ought to be held in competition with the liberty or life of a fellow-citizen. But, I conclude, by again declaring, that we shall rest satisfied, if the papers are sent; and, that it is not our desire, to put the President to the least inconvenience.

Mr. M'Rae lamented, that the discussion of so simple a question as the one now under consideration, should have been extended so extremely far from the course it ought to have taken. What had this question to do with the Government of the United States, or their persecution of Aaron Burr? How much more proper would it have been in the gentleman to have limited himself to the abstract motion to obtain certain papers. Whatever might be the guilt, or the degree of criminality in the conduct of Aaron Burr, or any other character, in this part of the business, is entirely irrelevant, indecorous, and highly improper. When the case comes to a state of trial, I will not, said Mr. M'Rae, hesitate to declare my entire and unreserved opinion before this Court, before a Jury, and before the whole world. Until then, I must be excused from fol-

lowing any course that shall violate decorum, however others may indulge themselves.

The gentleman need not have extended his fancy, by talking about the dignified and elevated situation of the President of the United States. Sir, we are anxious that the world should see, that, in the manner we conduct ourselves in the prosecution of this cause, we feel none of that persecution or tyranny which the gentleman has attributed to the Government. We do not think that the President is exalted above legal process; we admit that our feelings and our judgment strongly favour the impression, that, if the President possesses information of any nature which might tend to serve the cause of Aaron Burr, a subpœna should issue to him, notwithstanding his elevated station in society. Every man, whose life or liberty is at stake, ought to avail himself of the disclosure of what the President or any other character possesses in his breast, concerning his case. As we admitted, then, that a subpœna might issue, was it not entirely unnecessary that the gentleman should have indulged his acrimony about this deservedly esteemed character; which will, I am well persuaded, when the facts come out, appear as justifiable, as it has been long and well-spent for the benefit of his fellow-citizens, whose high esteem he has merited and received. These remarks might have been saved, had they not been provoked upon the charge of persecution. Here he read the affidavit upon which the motion was founded: observing, that, in relation to the orders, a copy was in Court, and subject to the pleasure of the Court.

Mr. WICKHAM. The Counsel tell us, they have the orders which we ask for, and that they will produce them if the Court should so direct. Sir, we have no doubt of this disposition; but, we have a doubt on the *identity* of these papers which they may produce. There may be several orders, and issued at different times. We want to know, whether this is a true copy of the identical order which we mean. Indulge us to see it, and we can at once decide, whether it is the right, or not. We have reason to doubt that it is. But, Sir, our motion goes not only to the orders, but to the original letter. Whether that letter contains State secrets or not, we know not. We are not to rest upon the *ipse dixit* of the Attorney.

Mr. HAY. Mr. Smith, the Secretary of the Navy, sent it to me; and, without any authority to make it public; I cannot, therefore, give it into the gentleman's hands, to subject it to the observations which may arise. We want not to give the paper out of our hands to furnish such declamation as we have this day heard; but, at the same time, have no objection to submit it to the inspection and pleasure of the Court.

Mr. M'RAE. The most important part of this motion, then, if I understand it, is, that relating to the subpœna for the President to bring the papers with him. I will read to the Court, the affidavit.

of Aaron Burr, for the purpose of shewing the Counsel for the prisoner, that they have not grounded their motion well; that part of the motion relevent to this letter, states, that it "*may* be material in his defence." Now, Sir, I have always understood, that any thing relating to testimony, should not be upon doubtful or uncertain ground; that it is incumbent to prove beyond loose conjecture. If it *may be*, it *possibly may not be so.* He certainly should implicitly state, that *it is* material.

Further: In criminal cases, the party should not only say that the testimony offered *is* material; but, he must state in what points the witness is material, and how it bears upon the case, or else it is defective.

As to the procuration of these public papers, I will observe, that, upon the authority of the Court, in the case of Cooper, who was prosecuted for a libel, it might be shewn, that the party now before the Court, have no authority to demand them. In that case, the public offices, in which were deposited the papers which the party demanded, were on the very spot, (Philadelphia.) Mr. Cooper, who pleaded two points, not guilty and justification, asked for certain public papers, to justify himself. The Court gave it as their decision, that he had no right to the papers asked for; and that the public offices were not at his command. See Cooper's Trial, p. 13, of the Report. But, Sir, strong and pertinent as this decision is; though it goes to deny the authority to urge such a motion; yet, averse to persecution, and to every thing that looks like it, we disdain to shelter ourselves under that principle. We will declare, that it is our most sincere and unequivocal wish, that there should not only be no ground of complaint against us, as to withholding testimony, but we will assist to obtain every thing he might call for. We claim not the benefit of this precedent.

When speaking of the disclosure of testimony, he makes an exception only in the Counsel. This exception does exist, it is true: Counsel cannot be compelled to violate the confidence reposed in him by his client. But the gentleman has taken a ground rather too narrow, when he supposes this to be the only exception. Suppose, Sir, a confidential communication was to be made to Thomas Jefferson, President of the United States, of an important nature, could any law or precedent be found to compel him to appear before this or any other Court, to disclose that communication? Certainly not. The point is so self-evident, that it would be unnecessary to urge a single argument in its support. I shall only refer the Court to the opinion of the Supreme Court, given in the case of Marbury, *versus* Madison, p. 144. Cranch's Reports. Mr. Lincoln, who had officiated as Secretary of State, was called into Court, to give testimony. He pleaded his official situation as an excuse; but, the Court determined that he ought to answer, as there was *nothing confidential* required of him to disclose; if there had been, *he would not be obliged to answer.* And again, in the same case, 166, it being supposed, that the Secretary of State

might receive confidential papers from the President of the United States, which is a mere ministerial act in him, the Court said that "where the Heads of Departments are the political or confidential agents of the Executive; nothing can be more perfectly clear, than, that their acts are *only* politically examinable: they are not liable to be enquired into before a Court." This indicates, then, that a Court ought to receive specific information as to the nature of the papers: whether they are important to the case, and whether they are of a confidential complexion.

But, Sir, though we have admitted that the President might be summoned to attend; and, if there were just cause shewn, why he ought to attend, yet that can be no possible admission, and every thing opposes it, that he should either be called upon to attend, or to produce this letter, if it should be a paper in confidence, and improper to be made public. He cannot, he ought not, in such a case, to shew it here, or any where else. If this be a public letter, then it is deposited in the archieves of the Secretary of State; and if that officer possesses it, there can be no occasion to summon the President, or to ask him for it. If it be a private confidential letter, then he is not obliged to shew it. The gentlemen do not pretend to say, that the President is to be called upon to give any evidence; if he were, the paper alone would not do, which they say, will satisfy them; and yet they talk about the process. I can, in no possible case, see the necessity of addressing this subpœna to Thomas Jefferson.

I beg leave to suggest the propriety of a copy, instead of the original. If you admit that the original might be read as evidence, why will it be inconsistent to admit the reading of an authenticated copy? It has been suggested, that if Gen. Wilkinson should be here, he might oppose the reading of it. But, be it remembered, that this Court is not to be controuled by him; and he cannot, nor will he dare to object; neither can he deny, as suggested, the contents of the copy, when he must know that in a very few days the original can be obtained to confront his denial.

Until the affidavit shall specify the particular necessity, and the nature of the papers wanted, together with their bearning on the case, that the Court may judge of their materiality; and whether they are confidential or not, I hope the Court will not allow the motion, or take any steps towards it, until the affidavit be so modified.

Mr. Botts would suggest a few remarks respecting these papers; against the obtaining of which, such insuperable difficulties had been raised. He had supposed, that in a country and Government like ours, there could be no State secrets, except in foreign relations; that it was an unquestionable right enjoyed by every citizen of America to call upon the Executive Departments of government for such information and copies of papers, within their possession, as might be required; and, particularly when wanted to promote the investigation of truth, as fees were provided to pay Clerks for copying public documents. If this doc-

trine was wrong, or if these papers were confidential, what would be the result? Why, it would be so answered by the Departments to whom application was made. Is this Court to judge? are we to anticipate? No, most assuredly; the officer whose right it inherently is, will decide upon the propriety of sending them after we have asked for them. Can it be asserted beforehand, that these are State papers, State secrets, or whatever they may be called, and entilted to all the immunities attached thereto? We cannot believe it; nor, do we suppose, the gentlemen can do more than conjecture it, because we have not heard such a thing asserted.

But, Sir, if there was once a policy in the Government keeping this matter a secret, that State policy must now have ceased; and, except this be an exception to the general rule, State policy itself cannot deny us the use of those papers. It has ever been hateful to my ears, to hear of the State policy and State secrets of Great-Britain; and yet we have an example, worthy of imitation, which recently occurred. On the trial of Sir Home Popham, for a disobedience of orders delivered him from the ministry, in a country where State policy has often been used to screen ministers from the ignominy which they justly merited—even there we find, that a Court, before whom the case was examined, demanded, and procured the attendance of Lord Melville, a Minister of State; they demanded of him evidence of the orders and instructions which he had given to the accused officer; and, he was compelled to give those orders to the Court. To be sure, he did not refuse; but from this it must follow, that State secrets even are not to be withheld from affording justice to an individual in a public tribunal. And why, then, or for what reason it can be suspected that our Executive would refuse to disclose such testimony as he possesses, and under what ground we should be discouraged from asking it in this free country, I am really unable to answer. One of these public documents was once asked for by a gentleman in Counsel with Mr. Burr; and, because it was promised, the most sanguine expectation was raised: but it was refused. Refusal would undoubtedly be the result of any other personal application; and, yet we had dared to suppose, that any individual in the community, who would state his particular want of it, might obtain it. It was refused when even stated to be a material document of defence against a charge, the highest which the law knows. Sir, we now claim it as our right, by virtue of the mandatory power and process of this Court. Here we recline ourselves for relief; and here we shall find assistance, because it is our right. I do not question the propriety or liberality of that policy of the Counsel on the other side, which keeps secret every thing from us, and which will be kept back from us until the very moment of our being obliged to face their whole phalanx when on trial, if that moment should ever arrive; but we must, notwithstanding, view it as a severe policy, that they should endeavor to keep back from us these papers, which, we contend, will serve our defence.

We are extraordinarily indebted to all the gentlemen for the liberality which they have bespoke, in giving up one point which we could have easily answered; that the genius of our Government having prescribed proper and suitable distinctions between the Departments, has, notwithstanding, made them all amenable to process of a Court, to attend as witnesses. But, when it is given up to us, that the President might be summoned and made to appear here, and yet contended that he shall not be forced to give evidence when here, we are lost in wonder. No, he must not disclose any private communications; he must reveal no State secrets which may be in his breast; but he may attend here, and state such facts as he, in his goodness, may see proper to communicate. Sir, our President may be a great and good man; I do not question it; but, however great and good, he is but a man. There is a policy, so mysterious to me, and so hidden from my perceptions, that I cannot be willing at present to give up the ground of what I see to be right. And, although the Attorney has assured us, that he has interested himself to procure these papers, of which I have no doubt; yet, rather than hazard being deceived by these assurances or expectation, I must betake myself to the legal right which we are depending upon.

The decision in Cooper's case has been resorted to, and for what? Sir, they would not have ventured to touch upon that authority which they have again and again reprobated, but to serve a present purpose. If, however, they are now convinced of their former errors, we must congratulate them most seriously, and hope that they will not be surprised at our discovery of their dereliction, whilst they avail themselves of that authority which they have uniformly hitherto declared to be wrong. They now shelter themselves under this opinion of Judge Chase, to prevent us from procuring the public papers which we contend we have a right of access to. Now, Sir, I claim it from their candour, and upon constitutional principles, to correct an error which I am sure was the result of a momentary view of the liberty of citizens, to call for public documents from the Departments of the Government; and, therefore, trust that their quotation will have no weight in the decision of this Court.

It is said, that we ought to be satisfied with a copy of General Wilkinson's letter. But, Sir, what would be the consequence, if Gen. W. should be placed before you; and, in answer to the interrogatories which may be put to him, he should answer one thing, whilst the language of the letter would express a contrary declaration? Will this copy be admitted to stand against his oath? And can we say it will not be so? Is it not necessary that we should be possessed of every means of detecting any contra-declarations? I think it will be much safer to place this document in possession of the Court, than any copy however exhibited.

What may be the consequences of such a measure? Sir, if ever the time should arrive, that this country, much as we now justly

boast of our liberties, when a person, charged with a crime which subjects him to the highest possible punishment, should be refused access to the hidden documents in the dark recesses of the Departments of State, that might and would operate strongly in his favour, and the Court should refuse to see justice done to him; although it should seem that no State policy should require it—if in such a case, I say, the Court should surrender the unhappy victim up to the law and to death, without taking to itself the right to call for that testimony which will assert and prove the innocence of the accused—disastrous, indeed, would be the event, and awful the situation in which the country would stand.

Motion was here made to adjourn the Court: Mr. WIRT declaring himself incapable, from the oppression of heat, to proceed in his answers.

Mr. HAY also complained of indisposition from want of health. This gave rise to many remarks on the state of the business.

Mr. WICKHAM, who was to answer Mr. Wirt, pressed the continuance at this time, from his engagement on the ensuing day to be wholly in the Court of Appeals.

Ultimately, the Court determined, that *the argument must now proceed.*

Mr. WIRT, after again stating his unwillingness to be *forced* into the farther discussion at this time, proceeded. It is believed on the part of the prisoner, that the President is liable to a subpœna *ducus tecum*, and bound to obey. We believe that the accused has a right to call for evidence which may be material to his defence, unless that demand shall compromit the material safety; but, in order to carry this into effect, we believe, that he is bound to prove, that what he requires is material to his defence. Here Mr. Wirt explained the difference between a *subpœna ad testificandum* and a *subpœna duces tecum:* in which the Counsel agreed. The materiality, he contended, was proved by reference to the case of Smith and Ogden.

Mr. WICKHAM. We admit that it is in the sound discretion of the Court; but, that the parties are bound to submit to that sound discretion.

Mr. WIRT. Then, Sir, it stands thus—that the Court reject or grant, as they may see proper. The motion now is, whether the Court will award a subpœna *duces tecum, instanter;* or, whether they will require to know how that evidence is to be used. In the case of Smith and Ogden, they said that the testimony of Mr. Madison, &c. was material to their defence, and they were bound to shew the substance and complexion of that testimony. The Court were bound to examine whether it went to the guilt or innocence of the party, and whether it at all applied to the case. They thought this examination to be an act of mutual justice. Now, Sir, we want the same mode of proceeding, and the materiality and bearing examined into. Either the paper moved for, ought to be plainly relevent to the case, or its admission should be granted by the ad-

verse party. In civil cases it is the practice, when the motion is made, without affidavit, to shew the materiality of the evidence from the nature of the issue stated, and the papers required. The only question relating to this case is, as to the guilt or innocence of the accused, on one of the charges exhibited against him—on Treason, or Misdemeanor. Now, certain documents are asked for. But, Sir, I will ask the Court, whether they can perceive the applicancy of them to either of these issues? That the Counsel for the defence contend for their probable application, is admitted; bnt, we think it incumbent on them to prove it to a demonstration. Every inconvenience possible, will result from our adverse doctrine. Suppose, for instance, Mr. Burr should move for the secret correspondence between the President and Gen. Wilkinson respecting our connection with Spain, would the Court, upon his affidavit of the probable materiality of such testimony to his case, order it to be produced? Well, if he has a right to demand this, he must have the same right to demand that, without shewing its efficacy. The consequences of this motion may be extended to any other papers that he may say will turn out to his advantage. So far the doctrine held np, certainly goes. I am very far from advocating, upon a general principle, the doctrine of State secrets: I know, in monarchical governments, its evil effects are experienced to the destruction of every thing like human liberty; but at the same time let us not indulge a contrary licentiousness. I must disapprove of the exposition of State secrets to satisfy the whim and caprice of every individual who shall choose to claim their exposure. Let it not here be inferred, that I would take one prop from under the accused, whereon he can rest his innocence. But, how can the means of evincing his innocence be impaired, by compelling him to shew the applicability of these, or of any other papers, which he might demand? Let him specify this in his affidavit, and then the Court *ought* to issue a subpœna. In such a case, I think nothing should be kept back, except what will compromit the national safety. But, I do think that the safety and dignity of public offices should not be countervailed by the demand of every, or any individual, without the evident necessity of the case shall appear.

It may be urged, perhaps, that by compelling the party to shew the object and bearing of the papers, you require him to unmask his defence. But, was not the same excuse made in the case at New-York. It was insisted that the nature and bearing of the testimony should be known before a rule was granted. The Court have a right to the exercise of their discretion in this case; but, can a better rule be devised, than that of Judge Patterson in the case alluded to? Sir, he need not unmask his defence: but he is not, on the contrary, to expect a compliance with his wishes on this *very loose* affidavit, in which not even an attempt is made to shew its materiality, nor is any proof offered.

But, what are the grounds which Mr. Martin rests the importance of these papers upon? He says, as to the orders, that their

object was to turn out the military force of this country for the purpose of apprehending Aaron Burr; that this order was given without constitutional authority, and in direct opposition to it; that it was sanguinary in its nature; and therefore that Aaron Burr had a right to resist it, upon the principle of self-defence; and these orders are called for, in justification of his intended opposition. This is extraordinary doctrine, indeed. Now, Sir, is this a plausible reason for calling for these orders? Does the Court think that they can have the effect suggested, even if they were produced? We call for its application upon the issue. If the Court believes the gentleman's reasoning to be just, and this excuse a sufficient ground, then the issue indeed will rest on the orders. But, Sir, if what they call a *justifiable defence*, should, on investigation, be proved to be *Treason*, what will then be the result of their arguments? Will the Court then see no necessity of the materiality of this testimony being previously stated? This opposition to a regular military force of the country, legally called out by the President of the United States, agreeable to the authority vested in him by law, amounting to High Treason, the gentlemen do certainly fail in what they think they are bound to prove. These papers are asked for with as much earnestness, and their applicability as much depended upon, as though we had changed sides—the President was arraigned here instead of Mr. Burr, and he was accuser, instead of being the accused; and the arguments and observations of the gentleman, applied to such a reverse of circumstances, much more, in my opinion, than they do to the case as it stands. But I do not see how this Court can have to do with the guilt or innocence of that high officer, in ordering out a military force to quell a combination.

Let us now speak of the letter of General Wilkinson. I am of opinion, that if the production of this letter would not compromit the safety of the United States, and it can be proved to be material to Mr. Burr, he has a right to demand it. Nay, in such a case, I will admit his right to summon the President, and every Head of Department. Now, I suppose, by the communication made to Congress, that this letter is lodged with the Department of State; and, if so, the copy will be as good evidence as the original. I am borne out in this opinion by the act of Congress which formed this Department—1 vol. laws U. S. p. 111. Then, Sir, when they have shewn the application of this letter, all they have to require is a copy, which is "evidence equal to the original record, or paper," in any Court of Law. Nor could Gen. W. were he here himself, deny such an authenticated copy, more than he could the original.

But, Sir, as no attempt is even made to shew it applicable to either the issue of Treason or Misdemeanor, will the Court grant an award to bring the President of the United States from the seat of government? At least, it might be supposed, that, before such a step is taken, good ground will be given for the measure. And,

as to the letter, from what we observe in the communication to Congress, it would rather tend to establish the guilt, than the innocence of the party; and so we consider the case of Smith and Ogden, according to the opinion of the Court, to decide.

Another remark I would make, is—Was a subpœna *duces tecum* ever granted with reciprocity of approbation? Now, suppose the President was to appear here, agreeable to the process, we might call for the paper from his possession; and, I presume, the gentlemen would not withhold the advantages of it from us. They might suppose that this orignal letter would not bear them out: but they certainly would not exclude us from the reciprocal use of it, if it would be supposed to serve us. This is the case with every piece of written testimony. Now, Sir, this being a question to the sound discretion of the Court, I conclude, that it will hold itself bound to enquire—Whether the motion would be productive of more pernicious consequences than if the motion were not indulged? And again—Whether it would do that justice to the country at large, which it should be the effort of every tribunal to render?

This appears to me to be the true state of the case. I have no inclination to follow the gentlemen into their authorities; because I believe that sound discretion and good policy will be sufficient to guide us to a true decision.

Mr. Martin has indulged himself to review what he supposes (no doubt because he says so) to have been the ill usage of Mr. Burr, the persecuting spirit of the Government, and the like. I could have readily excused him in the flights his fancy had taken; but we must perceive it to be but an addition to what we heard before from other gentlemen, even before the arrival of Mr. Martin. Instead of limiting the point to sound discretion, and argument, to support that principle, we hear furious assaults made upon the proceedings of the Executive. The defence of the innocence of Aaron Burr is neglected, on purpose that gentlemen might take occasion of abuse to the Government and its measures. Now, I will candidly ask the gentlemen, if this be not the way rather to influence the prosecuting into a persecuting spirit, if the Government were for a moment capable of indulging it: but it is not capable. Sir, if the gentlemen would attempt to prove that the Government has been guilty of the spirit which they charge upon it, let them prove that Aaron Burr is innocent of the crimes which we say he is guilty of. This will operate most effectually against the administration. But, Sir, is this Mr. Burr the *Sydney* or the *Russel?* Is this the intrepid *martyr* in the great cause of liberty in modern times? The truth is this, Sir—We say that we will prove him to have fallen a martyr to his own unbounded ambition. But why should we indulge ourselves with a word or a thought on these things? This is not a contest between Mr. Jefferson and Mr. Burr; and yet we find these characters dragged into discussion, as though the Court were so liable to passions and distinctions, as to take a

particular part. But why should this Court be made a canal of all the invective which we have heard? If Mr. Burr has been "hunted by blood-hounds," those blood-hounds were his fellow-citizens, whose patriotic motives were displayed to avert the threatened danger. Let him now, Sir, instead of blaming or retorting, purge himself of every imputation of guilt, and none of this will be heard of. I trust, that this unpleasant and unprecedented mode of conducting the case, will cease; and, that the strangers who attend this Court from different parts of the country, will look on our judiciary with admiration and respect, and not hear this Court addressed in a manner as though the Counsel could work them into prejudice; that they will not mistake this Court for a Mahometan paradise to indulge themselves in, for the purpose of invective, instead of argument. And, I trust, Sir, that the Court will not indulge declamation; but prove, that, when the Counsel are discussing a point of law, the law, and not extraneous facts, must be the point in dispute.

It was far from my wish, Sir, to transgress the true principles of decorum; and, I should not have swerved into these observations, but for those of the gentleman who preceded me.

Mr. WICKHAM. From the zeal which the gentleman has so admirably displayed, I think the Court must be well satisfied that it was only a fancied indisposition which he expressed as a reason why he wanted an adjournment before he commenced his speech. He was not satisfied in discussing the law of the case, but he must travel in that very wide field of declamation with a rhapsody correspondent with his exertion. I regret, truly, that this has been the case; but I will, with confidence, appeal to the Court, and to every individual present, whether we have not been continually tortured with the din of criminality, Treason, and all its concomitants! But, are we to sit still, Sir, and receive insult upon insult with tameness? After Mr. Burr was dragged to this place in the manner he was, have we not been perpetually told that he is guilty; that they not only believed his guilt, but would prove it: whilst these individuals themselves have, in rhapsodies of adulation, exalted the administration. Perhaps they imagine us to possess the same pliant and patient disposition as the great author of our religion had—who, when one cheek was smitten, turned the other also. Now, Sir, I hope the gentleman will imperiously charge himself, to exemplify his own recommendation; and then, I am sure, I shall be happy to follow his example.

At length he has brought us to the same ground for which we at first contended—That the President of the United States was liable to be summoned, and bound to obey it. Sir, was this admitted at first? Is not this the main ground of the argument?

Mr. HAY contended, that the power to summon was never disputed; but it was said, and he should again to-morrow object, that a subpœna *duces tecum* could issue in this case, upon grounds which, he believed, could not be denied.

Mr. WICKHAM. I must abandon my memory as well as my understanding. The gentleman is mistaken in point of *fact*. Mr. Martin came forward to declare what was prayed for. Mr. Hay then denied that a subpœna could be issued in any case whatever. A subpœna *ad testificandum* is a matter of right; a subpœna *duces tecum* is a matter of discretion with the Court. So far we travel the same road: but now comes the separation. He contends, that we are bound to shew the materiality of the testimony to our case; we say it is enough if we shew the probable cause. The case of Smith and Ogden was resorted to: but what was its nature? Why, that decision was made on a motion of continuance. We know, that it is impossible for a party to put off a trial, without they swear that they cannot go on to trial, and shew the grounds of their unwillingness. And why is this required? Why that no man shall, without evident cause, put off, or delay justice.

Mr. WIRT said, both the questions were before the Court at New-York, and the arguments were pointed both to the *continuance* and the *attachment*.

Mr. WICKHAM. I so understood it; but, it necessarily formed a part of the motion for continuance; and, therefore, they were connected. But, did not the Court, Sir, in that case, require affidavits to be made out of the usual form; and why? Because, *prima facia*, the persons at Washington could not prove what was transacted at New-York. What were they to prove? Why, that these gentlemen fitted out an expedition for sea, under the authority of the President of the United States. The answer was, that the President had no right to declare war with any nation; and, therefore, even if he did sanction it, no testimony of the officers of Government could avail.

But, say the gentlemen—What possible application can General Wilkinson's letter have to this case? Sir, have we not seen General Wilkinson's affidavit, charging Mr. Burr with certain crimes—which, however inconsistent or impossible, is so strong, as, that Mr. Hay depends much upon it; and yet he says he cannot send up an indictment until Gen. W. comes here himself. Is not Wilkinson, then, the pivot upon which the whole of the charge of Treason turns? That being the case, will it not be a question before a Jury, whether this man is to be credited or not? Should we not be at liberty to say, that this man, upon whom so much dependance is placed, has, at one time and place, said one thing; while, at another time and place, he has said another thing? Are we to sit down, and say nothing about his letters, declarations, or actions? Sir, except they mean to make General Wilkinson as immaculate as the Government itself, we mean to try to prove that Gen. W. may contradict himself; nay, has contradicted himself; and, therefore, that his credibility is not to be depended upon.

Upon this occasion, without referring to the record, I might allude to the transactions of Gen. Wilkinson at New-Orleans; to the situation in which he stands in public estimation on account of

his general conduct in the transactions of that quarter; and of the necessity he has to bolster up this prosecution; because, if he fails in this effort, he falls into irreparable disgrace. Then, Sir, this man will come forward with every motive of interest to prop up a sinking character. And do gentlemen suppose that we have rested until this moment, and have not been looking out for testimony in our behalf? That we have traced none of those facts which may operate to fix the stain on this man? The Court will allow us the right to impeach the credibility of this man, and sift his conduct to the very bottom, if we can ever attain to that point. Gen. W. has given three or four representations of this affair: one at New-Orleans, one to the President, and elsewhere. We want to compare that sent to the President with the others.

But this puts the public officers in the power of a party! And what, Sir, are the public officers created for? Are they for the good of the public, or *vice versa?* The gentlemen forget the end that government is formed for. It is established for external defence, and internal protection. And if it is meant to protect the citizens in their natural right, shall those rights be abandoned, merely because it would put a public officer to a little trouble, or inconvenience to search for it?

But we are to shew the materiality. How can we do this without revealing our whole ground, and betraying the depositary of our strength? We say, that it is material, because Gen. Wilkinson wrote it to another man, and because it communicates something which has a bearing upon our defence. But I will go farther; I will suppose that Mr. Burr may not know that it is material; but, have we not a right to it from its *probable cause*, that it might be to the advantage of our defence? But, as the credibility of the essential witness will have to be examined, surely the Court will see the probable bearing of this letter in our behalf, even although we may confess that we do not know its contents.

It may contain the secrets of the Government, it was said. Mr. Wirt declared himself to be averse to State secrets. Now, I am sure, that he would not speak what he did not really believe; but, I am equally sure that what he said, appeared to be adverse to his professed doctrine, because one of his professed objections was grounded on the probability of its being confidential. But, Sir, what is the result of all this? If the letter contains State secrets, will not the President, upon his oath of office, say so? And will not the Court believe him? But, I do not believe that he will withhold the letter; and, therefore, I believe all this argument to be premature. But, Sir, these State secrets might have existed at the time the letter was received, and no necessity of them now exist. That they do now exist, it is incumbent on gentlemen to prove. All and every act at that time was enveloped in State secrecy; but, I presume, when all these communications were made public, every thing became public. There can, therefore, be no State secrecy in this letter.

Innocence and truth, Sir, plead very powerfully. Now, suppose Mr. Burr to be an innocent man, as I have a right to suppose him, and so has any one, until some proof of guilt shall be made to appear. Suppose him to be in quest of truth, as I really think he is; is it not of very great importance that he should be possessed of every piece of testimony that would any way tend to shew his innocence, and prove the truth of his cause? Might he not ask for this very paper, without swearing to the particular points on which it is applicable; and more so, since he knows not what the facts therein stated are particularly designated to be? If he can swear to them as probably useful to his case, he certainly goes as far as the law requires. How is it possible for our affidavit to be expressed? We presume it is not necessary, when we shew probable cause. I contend that no other affidavit is necessary, than we have given to obtain these papers; the necessity of which are strongly evinced, since the gentleman has declared, that the moment Gen. Wilkinson arrived, the prosecution would proceed.

We are told, Sir, respecting the defence on Blannerhasset's island. Wherein did we admit that there was such a thing as defence, or even military array, upon Blannerhasset's island? We totally deny the position, and every person knows there was no such thing.

Mr. HAY. Does the gentleman mean to say, that we know there was no armament on Blannerhasset's island?

Mr. WICKHAM. I do own that it is my belief that there was no such thing.

Mr. HAY. I do believe that there was: and, further, I believe that when it comes before twelve honest men, they will believe so too.

Mr. WICKHAM. Not meaning any thing personal, I will only say, that the agents of the Government know the fact to be otherwise; and I should have supposed the Attorney to have known it. I am desirous, however, that he should know that no imputation of guilt is intended towards him; for, I think him to be incapable of it.

I do not know, Sir, that the observations of my friend (Mr. Martin) related particularly to Blannerhasset's island; but, I believe most particularly to his passage down the Mississippi. He certainly used a very strong expression, when he talked of Mr. Burr's being hunted by blood-hounds. But, I will say, that orders were given to hunt him through the United States; and therefore, by what names the instruments are called, I care not, since the effect must be equally prejudicial. Now, as to what Mr. Burr did, it is one question; but, as to what he has a right to do, is another. Gentlemen have indulged themselves with observations on this subject. Mr. Wirt says, that he opposed the military force of the United States, and he had no right to do so. Now, I only find fault with the premises. If the President of the United States should think proper to order out the military force of the United

States to take Aaron Burr, and all his property and adherents, we will say, that any citizen of the United States has a right to assume the power of a Bashaw, and command out his Jannisaries on any pretence, or at any time when he pleased. We have a right to say what the conduct of any man in the community would justifiably be, if the President was to order out, and head the military force of the country, for whatever pretence. There would be no bounds or restraint to such illegal steps.

I must confess, Sir, that if ever such measures should be countenanced, there will be exhibited in this country, a spirit that will strongly evince that such tyranny shall not exist. We have a right, not only speak of these things, but to resist them. We deny the position of Mr. Wirt, as to the power of the President to order out the army whenever he pleases; he has it not by the Constitution, nor laws; and, if he is not authorized by either, what can we call it but military despotism; and, if he had no right to order out a military force, any man whatever could array an army with the same propriety himself, because his conduct is to be governed by that safeguard of our country—the laws. What might have been the consequence of this stretch of power? Why, Sir, an insurrection; and, from the tendency of these orders, Col. Burr might bless God that he is not now in his silent tomb, instead of his being in a Court of Justice vindicating his rights. Then, Sir, I trust that whilst we live under such a Constitution and laws, we might claim the right to enquire, whether such orders were given or not; and if they were given, I will be bold to say, that Mr. Burr had a right to resist them by all the means in his power to procure.

Returning to this letter. Mr. Wirt says, it may be in the Department of State; and being there we are only to have a copy. Now, this is scarcely to be imagined: a letter written by Gen. Wilkinson to Thomas Jefferson, President of the United States. It is to be presumed he keeps the letter in his own bureau, and did not send it to be deposited in the archives of State; and therefore, to him application is to be made, for the original, and not a copy. What will Gen. Wilkinson say, if a copy is brought here to confront him with?—"I never wrote that letter, but some of the emissaries of Burr wrote it: there is no proof that I ever knew any thing about it, and I deny it."

But, Mr. Wirt, after admitting with the utmost candor, that we have the right to call Mr. Jefferson here, tells us that we must produce strong reasons. Why strong reasons? Sir, cannot the administration go on, whether that letter is here or at Washington? Is that letter a Tallisman that cannot be touched without vanishing away in smoke? Sir, will the absence of that letter "stop the the wheels of Government," to use the expression of a great man on a former occasion?

But, the gentleman says, if we get this letter, it will be evidence against Mr. Burr, as they will have a right to use it as well as we. Truly, Sir, they will; we cannot stifle it after it is presented as evi-

dence; but, have they reason to complain, if we should be so simple as to weave a net to be entangled in ourselves? We can judge about its operation and efficacy for ourselves. But certainly, although we may be in possession of that piece of testimony, we may reserve it; we are not obliged to bring it into view. On the whole, Sir, I can see no good grounds of objection, why we should not have these papers, upon shewing probable cause; which we have done in our affidavit, and the observations already adduced.

Judge MARSHAL observed, that he was sorry to see so great a degree of feelings manifested on both sides. These things ought not to be done: they could have no good effect. To be sure, it had been hitherto suffered; because, as it was indulged on one side, it was but fair to give the same allowance to the other. It may be proper in the Court, at this time, to express a wish that such a mode of conducting arguments, *on both sides*, may have closed; and it would be gratefully esteemed, if gentlemen, of their own good sense of propriety, would permit their understandings, as the best guide; and not their feelings, to govern them.

THURSDAY, June 11, 1807.

Mr. HAY. Yesterday, when the motion to adjourn was made, I was exceedingly unwell; and yet the very unusual conduct of the Counsel, on the other side, compelled us to proceed. I yet feel very much the same; but, however laborious, I must proceed to answer the arguments of the gentleman last up, and the remarks generally on this subject.

It was the pleasure of the Court, yesterday, to recommend to the Counsel, on both sides, a more strict adherence to the point in debate, and not to exhibit those traits of asperity which have been heard. With respect, Sir, to the Counsel for the prosecution, I think I may say, the admonition was entirely superfluous; but, as to the gentlemen on the other side, I will refer to your recollection, whether the arguments and temper displayed, have not had a tendency to the evil complained of. I am contented to act with the most strict conformity to the direction; and, I trust, that those who come after me, will exemplify the same. I lament that the admonition was not made earlier, that there might have been mutual profit received; for if it had been made in due time, I might have been saved the trouble of many remarks which it is now incumbent on me to make; and spared from hearing many, that were as irrelevent to the question, as they were to that due course of propriety which all debate ought to assume: remarks that, as a public prosecutor—as a friend to the country—as a supporter of the Constitution, the laws, and the Government of it—I must say, were totally unwarranted on any principle of propriety or fact. But since the admonition of the Court has been given, I will not even name them, but leave them to serious reflection.

Before I enter more into the merits of this question, I will take leave to remind the Court, that the objection which was taken yesterday to the right of the party, in his present situation before the Court, is not impaired. The more I reflect upon the subject, the more I feel its force. I contend, that a man who is not, strictly speaking, in Court, although he may take out a subpœna, or take such other measures as his situation will admit, has no right to the process of the Court in his behalf to procure testimony in his case, or to take any other step which it is the exclusive act of *a Court* to perform. I hope, Sir, that in opposing the motion made in behalf of the accused, to enable him to get testimony, we shall not be supposed to act with any degree of severity, or from any desire to take advantages towards procuring the conviction of the accused. No, Sir; we wish to meet the accused upon legal ground, and to keep within the limits of the law. The truth and sincerity of this declaration, I trust, will be tested and evinced by this fact:—That I have voluntarily and gratuitously endeavored to obtain for the gentleman all the testimony that he is seeking to obtain at all this expence of time and trouble: all of which might have been saved, and the papers appear the same. I wish the principles by which we are governed, and the ground upon which we stand, to be seen and known by all men: that every body might know that we are governed only by a desire to promote equal justice.

I am doubtful, Sir, whether I shall not depart in some degree, from my declarations made to the Court, when I notice the observation that was made by Mr. Wickham. If I do transgress, I intreat the Court to stop me. But, it was an observation so strong, so completely unwarranted, and the effect intended to be produced upon the public mind so palpable, that I must notice it at least. I say, it was not said to the Court nor to the Counsel, but to the people; and what makes it worse, is, that it was not warranted by fact. The declaration was, that we were catching at every thing within our reach for the purpose of bearing down the accused: that rushed on with furious pace to procure victims. Sir, has a single occurrence taken place since the commencement of this prosecution, which has evinced such a spirit? I speak for myself and those engaged with me, that the charge does not bear upon us. But the gentleman has gone on to speak of what he was pleased to suppose our versatility, in acknowledging, *at last*, as he suggests, that the President of the United States might be summoned. Now, if that were truth even, he ought rather to have commended our liberality for making the declaration; but, he speaks as though we had given up the point, upon mature deliberation, whilst we deny that ever we advanced a contrary doctrine. Any eulogium on our candor, therefore, will not apply. I have ever admitted, because I have invariably thought, that a subpœna could be served on the President. I never had an idea of clothing the President of the United States with those attributes of divinity, as Mr. Martin was

pleased to suggest—I never had a thought of his superiority, in this respect, to other men: and he must pardon me, when I say, that he knew I never had entertained such an idea. That high officer is but a man; he is but a citizen; and, if he knows any thing in any case, civil or criminal, which might affect the life, liberty, or property of his fellow-citizen, he has a right, it is his duty to do, as one of the best men, (Cato,) did before him—go before a Court, and declare what he knows. And what would be the process, in case he failed to attend? Why, the common means would be, for the Court to issue an attachment to force him; but, I presume that he would not fail, unless for essential reasons of State: and, surely, if public business should prevent him, the Court would admit it as an excuse, upon fair and reasonable principles. But, Sir, although we have uniformly admitted the principle that a subpœna could issue; we have as uniformly denied, that you could bring him into Court by this particular process. From the one admission, and the other denial of these two points, the gentleman endeavoured to point out some manifest dereliction of argument; but, whilst digging a pit for us, we saw him fall into it himself. Never were facts, and arguments, surely, more misunderstood, than ours have been. We have even been charged with admissions, recessions, and contradictions; but these inconsistencies are not pointed out to us. He supposed, that, in our quotation respecting public documents, we were caught; because, we had always denied the principle of secrecy. He pointed his finger to the argument, but he did not put his foot on it; for we have never considered that solitary decision as *law*, because it is repugnant to every principle of *right*. I mean not to allude to the character or circumstance by whom, to whom, and where this was made, as it cannot be esteemed a correction. I trust that in these my wanderings, I have not incurred the censure of the Court, because I have said nothing to rouse the feelings or displeasure of any one.

I will now come to the question, whether a subpœna *duces tecum* ought to issue in this case. It was yesterday contended, that this was a motion to the sound discretion of the Court. If so, what is the plain and necessary result? Why, Sir, that it is to be granted or refused, according as circumstances shall appear: that it will be granted, if substantial justice requires it; and that it will not be granted, if it shall not appear to be necessary to the defence. I cannot state the proposition more plainly than this.—The Court being called upon to issue an award, cannot issue that award, unless they believe the evidence sought for will be material. Now, Sir, the accused does not say that it will be material. The affidavit, observe, is worded with peculiar caution—"they *may* be material." I ask the Counsel, and more especially the learned Counsel, Mr. Martin, whether in his 30, or 35 years' experience, much of which as a public prosecutor, such an affidavit has ever been presented to, and accepted of by a Court? I should suppose one main purpose

would be, to satisfy a Court of certain facts: but, there are no facts stated here, nor are any orally adduced. It might be correct; but if so, I will venture to say it is unprecedented, and that the Court *cannot* decide upon it. It may be material! How may be? It may be, by putting it in their power to speak as they very often have done of these papers—representing them as in the highest degree barbarous, illegal, and a just cause of opposition; and, therefore, enables them more easily to crush and overwhelm plain matters of fact. All this *may* be—nay, all this *will* be said, and very emphatically enforced, and more particularly before a Jury. Of this we are aware: this may be the object. Sir, when I recollect what has passed, I am forced into an anticipation of what is to come. I must beg the gentleman's pardon for my freedom, but it really seems a little farcical, that these papers should be introduced as the foundation of a motion of this sort. *These documents may be material.* Well, Sir, does this not indicate an impression, that they *may not* be material. Now, suppose he had put in the words, *may not be material*, (for we are surely at liberty to extend the doubtful case to that), would the motion have been attended to? Its absurdity would have appeared in an instant; and I really think it appears nearly as apparent in its present form. If any of the gentlemen can furnish one single case, either from precedents, or from their extensive memory and practice, to compare with this, I am done. Until then, I must, at least, suppose it to be irregular.

But, Sir, if this paper was sufficient to procure the object, what would be the consequence? One inevitable one; and that is—that all the papers in the archives of the government would be at the command of Aaron Burr, to gratify his curiosity, or for other purposes. He might directly say, all papers relating to our concerns with Spain on our frontiers, would be material for his defence. I am sure that the Court will not listen to such an application, unless it shall appear upon a foundation vastly superior to this. Can the Court say, that public justice requires this step to be taken? Can they indulge the impression, that these papers are of material consequence? And cannot they see the more than probable inconvenience that would be experienced in issuing the process?

But, I contend, that this affidavit would not be sufficient, if he had said (what he dared not to say) that the papers *are material* to his defence. An allegation on an oath would not be sufficient. The Court, before exercising any extraordinary powers, must be convinced that they *ought* to exercise them; and this they can do no way, but by being informed *how* they will be material. Upon this the Court must exercise its sound discretion. And can they bottom this sound discretion upon the oath of a party, who of course having a great interest at stake, will represent things by his own impressions? Every man in society, the Court must know, is led by his own feelings, and cannot be trusted to every extent. This is a sound opinion of our ablest lawyers. In the case of Smith and Ogden, which excited a greater clamour at New-York,

if possible, than this case does here, the opinion of the Court was given upon the subject. Mr. Madison and Mr. Dearborn were said to be wanting as witnesses—but how did the Court act? They demanded not only a general declaration, but a specification of the result to be expected from their testimony to the issue. It was found that what they could say, would have no bearing on the case; and, therefore, the motion was not admitted. Mr. Wickham admitted the right of propriety of this specification—because, he says, it was *prima facia* presumable, that the witnesses in Washington did not know what was passing in New-York. Now, Sir, I will ask, whether the reasoning is not conclusive against himself; because it is here, *prima facia* presumable, that Gen. Wilkinson's letter would be against Mr. Burr; and, that the orders which issued upon that and other information, instead of going a step towards establishing his innocence, would be found manifestly expressive of his guilt, in all the transactions which were exhibited from New-Orleans to the seat of this empire. The great probability, I repeat, is, that if these papers appear, they will operate in a different way from what these gentlemen may wish.

We asked for a specific affidavit. In this, Sir, the gentleman would not yield to our doctrine in words; they would not formally admit that they were wrong, and we were right; but their conduct proves, that they felt it to be so; and, in spite of all their efforts to keep upon the ground where they had placed themselvs by the language of the affidavit, they have endeavoured to do by their arguments, what their client had not endeavoured to do by his oath: for they have endeavoured to furnish a specification in words, which ought to have been furnished on paper. This is the only difference.

I will here notice the unexpected remark of Mr. Wickham on this letter. He says, that this letter will be material, because Gen. Wilkinson has written letters to other persons, which are different from this. How this fact can be made to appear, I know not. Has Mr. Burr ventured to state this fact? I trust the Court will not take the gentleman's mere *ipse dixit*. It must pass for a bare, unproved declaration of Mr. Wickham's, tending to remove a strong conviction of his wrong; but, which, it can by no means effect. It is so totally unwaranted by any fact that has appeared, I cannot believe it to be an original impression of the gentleman; but that it was wispered in his ear, and then stated by him—surely, not as a fact to be relied on. If such a thing had been, it ought to have been stated on oath, before it can be material; or if the gentleman pleases in this instance, "probable cause." Now, suppose Gen. Wilkinson has written letters of this description, ought that circumstance to be regarded in this state of the enquiry? There is something exceedingly incorrect in this business. The gentlem n does not know what the letter contains, and yet broadly declares that this letter is different from other letters which have been written! Do not the Court see to what a deplorable situation these gentleman are reduced to, and what untenable ground they are compelled to oc-

tuppy? This declaration is true, or it is not: if true, then why does it rest on declaration, and not be shewn to the Court? If it be not true, then they were not warranted to mention it.

Some observations in a truly extraordinary style, and of as uncommon a nature, with respect to the orders, were suggested by Mr. Martin, and afterwards dressed up by Mr. Wickham.—They unite in contending, that the orders ought to be here, because they *may* be material to the defence: because, in short, they were arbitrary, tyrannical, and issued in violation and defiance of the Constitution, and merely for the purpose of oppression. (I will not repeat the very strong and harsh language of Mr. Martin.) Well, of course, Mr. Burr had a right to oppose these unconstitutional laws, and to resist the tyranny, by force, which the Government endeavoured to practice upon him. The gentleman will excuse me, I hope, when I say, that from a man of the age, long experience, and knowledge of mankind, possessed by Mr. Martin, I did expect to hear other doctrine. I am surely inclined to hope and believe, that this doctrine and principle was not learned in Maryland; and, I will assure him, that it is not the doctrine of this place. I really had a hope, that, as the gentleman had come all the way from Maryland to enlighten us by his superior talents and understanding, and improve us by his better principle, he would not have advanced, in the face of this Court, and of the people surrounding us, a doctrine so untenable and incompatible with every principle which is calculated to preserve the very existence of the government, or the happiness of the people: a principle, which would have been viewed with horror amidst the sanguinary scenes of 1794, in the horrid period of Jacobinical government in France.

But, Sir, I hope to satisfy the Court, that this is a wrong position; and, that the introduction of the papers cannot be vindicated upon the ground, (even admiting it to be correct,) that Mr. Burr had a right to repel by force the orders of the Executive to arrest him. What is the law on the subject? The President is bound to call out the military force, to suppress any combination against the laws.—Laws U. States, vol. 3, p. 181, and 192. He is sworn to support the Constitution; and, is expressly required, to have recourse to the military and naval forces of the U. States, for the purpose of suppressing and quelling every scheme which was then in agitation, tending to an interference with any nation in amity with us, as Spain was. In conformity with these laws, he issued the orders. And yet we are to be told, that they may be lawfully opposed by the persons against whom they were issued! Self-defence, agreable to law, is one thing—but, opposition to lawful Executive authority, is another.

I will not say that it is Treason, or even a Misdemeanor, to advance this doctrine; but, most deplorable must that case be, which requires such doctrines to support it. Let us examine a little farther. Suppose the Congress of the U. States, under some wrong impulse,

or other, (as all public bodies are liable to be at times,) should pass any arbitrary and oppressive law—such as the excise law, tending to bear very hard upon some particular portion of the community; suppose the people, feeling the oppression, and acting in conformity with the admirable precept of the gentleman, determine at all events to oppose it.—Now, Sir, would they not be guilty of treason in opposing it? That point has already been decided beyond dispute. If then it would be treason to oppose one law, it would be equally so with another. Here is a law which the President is bound to execute, as he has pledged himself to do so with all.—Resorting to information which he has received, he has good ground to believe, that an armed force is raised for a particular illegal designation; and he issued orders to stop and take them. Does he not, in so doing, perform a commendable official obligation? Sir, to oppose those who are intrusted with the execution of the laws, and lift his hand against the government of his country, is criminal; notwithstanding Mr. Wickham, in this case, says, that Mr. Burr acted as every man of courage ought to act. Surely, this novel doctrine, and new-born zeal, would carry the gentleman too far: this is extending human liberty beyond what it will bear. They must excuse me, when I say, that they do not so well understand the true principles of human liberty as they ought; they are travelling in a path which they do not know; they are anxious for principles which they have not heretofore, through the long period of their past lives, entertained much solicitude about. It certainly is a new doctrine, I must repeat it, and what I never should have expected to be advanced before a respectable and enlightened Court and audience—that a person, charged with treason and misdemeanor, should attempt, with approbation, to lift his hand up against the means used by the government to suppress that treason. Sir, this doctrine never surely can be heard with patience. But returning again to the subpœna. Here is one of the pillars and supports of our government, (the Judiciary) issuing a process to be served on another of the departments, (the Executive) and what for? Where is the foundation for such a step. Will it not be expected, that there should be good grounds for this measure, or will it not be received as a sort of insult? Sir, the doctrine is wrong, the inference is wrong, and every thing is wrong about it; and, if such a process was to be issued upon the grounds which have been produced, (and I do suppose they are the best that can be) the result would be equally wrong. But how can this Court issue such a process, after it has been decided by one of the Courts, that there was probable ground to commit the accused upon a charge of misdemeanor. The affidavit is deficient; and, it might as well have been offered to the Court to issue process without an affidavit at all, as to send a process on one, which will subject the Executive to an arbitrary tribunal.

The Court ought to be satisfied of another thing: not only that it is material, but that the letter is of a public nature. I will not under-

take to say, whether it is or not; but, if it is, I will admit that the accused has a right to demand a copy of it. If it is pertinent to the case, I have no doubt, but, upon being made to appear so, it would be immediately granted, if it would not commute the interest of the country. All that I know of its nature is, that mention was made of such a letter by the President to Congress; and, I suppose, this is that which covered the letter in cypher. Whether this contains a detail of Mr. Burr's designs or not, I know not; but, I suppose, there are some important discoveries made in it. There may also be much said in it about the situation of the Western country; the disposition of the people; and perhaps some things are unravalled, and some characters named, which would render it improper, even at this time, to be exposed to public view. Well, shall the Court then, notwithstanding the contents may be of this nature, demand that it shall be brought here? But if it be suffered to be copied, such parts as relate to the case, and are not in themselves of a private nature, would be had.

But gentlemen say, that they do not require the President's personal attendance; and, yet, they call for a subpœna *duces tecum*, directing him to bring the letter, and copies of these orders! Now, I contend, that the person who possesses this letter, as well as the other documents, ought to be addressed personally. And who is this? Can any gentleman say, who holds possession of this letter? It may be of a public nature, for what we know; or, it may be private. And pray, Sir, is the President to be of necessity *custos votulorum* to keep the papers of the United States, which pass into his hands, until they are called for by any person who should choose to demand them? Was it for the pleasure of introducing the name of the President of the United States, in order to produce a shock against him, that he was mentioned in this case? For, surely, the proper keeper of the archives of State, is the Secretary of State. The laws, vol. 1, p. 32 and 110, particularly specify where the duty devolves of keeping public records and original papers of State; and, I should not have supposed the gentlemen to be so devoid of decorum and decency, (they will pardon me) as to think of addressing the President for them.

It may be said, perhaps, that he has the controul of all the departments. Certainly he has. If he was to order the Secretaries to send certain papers here, no doubt but they would do it: but, why should he be troubled to do it, when it is more readily attainable by application to the proper departments? Now, as it respects the orders, I presume they issued from the President, through the department of State—who files the original, and sends certified copies to the Secretaries of War and of the Navy respectively.

But, Sir, the Court ought to be satisfied of another thing. These being public papers, as the gentlemen say they are, where is the necessity of putting the Court to the trouble of getting, what it would be in their power to get themselves, perhaps? (This is intended as respects the two orders.) Have they ever applied for

copies of these orders? Is it any answer to say, that Robert Smith was applied to by a gentleman, and he refused? But how did he refuse? Not in direct terms, if I understood the gentleman; but acknowledged that he would send it, if the evidence should be of great necessity. But whether refused or not, it does not justify this application to the President. If application should be made to compel the President to hunt for documents, common decency must require that it should be proven, that application had been made elsewhere, and refused.

But as to the letter, they say, that they do not want a copy; and, therefore, it is in vain for them to apply individually. True, Sir, it would be in vain. But why must it be produced now? Why, because they say that if they have only a *copy*, Gen. Wilkinson will deny it. Desperate indeed! Can gentlemen be serious in this most preposterous presumption? Do they really believe that this letter will be denied when accompanied with the great seal? Sir, they know he will not deny it—that he dare not deny it. Now, Sir, will the Court take this very utmost stretch of human suspicion, accompanied by no grounds whatever, and even out of the class of probable events, as reasonable? Before this ground can be admitted, it must be filed among the documents of this Court, that reason must be affixed to their affidavits, that they have reason to believe, that Gen. Wilkinson will deny the copy, before they can attempt to tear down and rend his character. Sir, I cannot hear such things as these, without much concern and agitation. I do believe, that since the commencement of the first discussion of this business, every principle of propriety has been ungenerously and wontonly violated. Is this the way, the conduct and character of a man, who has obtained the confidence of the Government, to be placed at the head of the army, (a trust of no small importance) is to be attacked, unheard? Sir, it is not my business now to vindicate this character; my own knowledge of the events cannot sufficiently warrant me; but, I believe, the ground to be mere unfounded suggestion. I should be sorry (not for Gen. Wilkinson, but, for my country), if there was the smallest ground for believing it.

Zeal, Sir, has often usurped the place of my understanding, and has sometimes carried me too far; but, I trust, that my zeal has been always in a just cause: in the defence of my country—or, in the defence of insulted law. If in these things I go too far, the reason must plead the excuse of my zeal. Sir, it is immaterial whether Gen. Wilkinson desires the copy or not; it will have the same effect; the act of Congress admits it as good evidence. It was said that this act did not apply to this case; but is not the Court governed by law, and the act governs all cases that can come before a Court. How can you make the division, when the law says an authenticated copy of any paper should be evidence the same as though the paper itself were present? What would be the result, suppose the Court was to direct the original letter to be brought?

What would the Secretary of State say? Why, that acting in conformity to the laws which he was sworn to maintain, he could not send out original papers; because, for the purpose of safe-keeping all such originals, the law had provided, that in every case, a copy would operate the same.

I do contend, that no subpœna *duces tecum* can issue to the President in any case whatever, to direct him to bring any official papers, because he has none in his possession; but, that a subpœna can issue upon him in his own proper person. Nor can it issue to the Secretary of State, because the act of Congress expressly declares that an authenticated copy will be effectual, and has been invariably sought to with effect.

I repeat once more, and for the last time, that in my opposition to this motion, I have not felt the slightest disposition to deprive the accused of the benefit of any evidence whatever. On the contrary, I have written for the papers in question; and, it is my most fervent wish, that they may be sent, as I sincerely believe they will be. I hope this *important* question, which has long agitated the country from one end to the other, may be decided upon *all* the evidence that is connected with it, so as to do justice to the accused, and give satisfaction to the country at large.

Judge MARSHAL. I understood that Mr. Smith did not absolutely refuse to send a copy of the order from his department, but referred Mr. Randolph to the legal mode of obtaining it. What is that legal mode?

Mr. HAY. I think it is by applying to the Secretary of State. How far it might be proper for him to give a copy of any order which did not originate in his office, he might justly have a doubt to decide. Now, suppose an order or edict was given to call out the army or navy: this order is given by the President, the Secretaries act upon it, and the order is registered. These officers are mere subordinate characters.

Mr. M'RAE would call the attention of the Court to some parts of the message of the President to the House of Representatives. A resolution passed the House, requesting the President to provide them with such information as he might be in possession of, *(not of a confidential nature)* respecting our affairs to the Westward. They possessed a well-founded expectation that some communications had been made to the Executive, which ought not to be disclosed; and, therefore, modestly avoided interference with such parts in their request. It applied to various papers, not any particular one. Mark the result. He sends extracts from two letters of Gen. Wilkinson; but, of the letter of the 21st of October, only gave a general outline of its contents—so far, it may be presumed, as it was of a public nature. The inference is obvious: it is natural to suppose that some parts of it is of a nature not to be made public. And if he did not think proper to send it to Congress for their inspection, is it to be supposed that he will communicate it to a Court?

Mr. HAY thought it really extraordinary, that, when Congress

should have asked for certain information, such as the President deemed proper to disclose—and he should have thought proper to make a reserve of this letter, except some general outlines, whilst he copied extracts from two others—that whilst he should deem it necessary to withhold it from the confidential servants of the people, this Court should go forward and demand it! He would not say, that the President of the U. States had a right to the peculiar privilege of exemption from animadversion on his public conduct; but, certainly, some respect was due to his office; not only by the citizens at large, but also by gentlemen of the Bar; and yet here a demand is made, not for a copy, as though they were afraid of not getting a correct one, but for the original. This did not look, nor sound so respectful, he thought, as the situation required.

Mr. E. Randolph. I shall now endeavor, may it please the Court, to make use of the time which is due to me, according to the measure meted out to others in argument; which, I hope, will convince the Court of the justice of our claim, whilst it will escape their censure. I was in hopes, however, that a part of my argument would have been spared. I did not suppose, Sir, that after what had been submitted to, there would have been a resurrection of distrust in the mind of the Attorney. He talks about the situation of Col. Burr; and, seems surprised wonderfully, that we should make such a motion. Now, what is this, but saying that Col. Burr is not in a situation to demand evidence, except what he may be pleased to be satisfied with? I make no appeal, in what I say, to what Mr. Hay called "the multitude"; but, I must state the position; which, is one, that will strike every mind with horror! But, what is Mr. Burr's situation? Is he not in a Court of Justice, duly held under a recognizance of an immense weight? And, yet is he not, day after day, and week after week, kept in suspense and expectation—bound to meet, if ever he should appear, this great accomplisher of all expectation—*Indictment*? And have you not bound him to await the filing of an indictment; and, to meet all charges, in every shape, that may, or can be exhibited against him? Has he, by submitting to the will of Mr. Attorney, in giving further bail, resigned his right of defence, by obtaining testimony to justify him? Sir, he cannot properly defend himself without these papers.—This we have declared again and again; and, yet, the gentlemen ask for grounds! But, Sir, we have proved our right. Why did we not hear this objection made, when the pannel of the Grand Jury was made up? It was for a moment hinted at, but we struck it to the ground. Yes, we produced the unquestionable authorities of Hawkins, of Tooke and others, to prove—that a man shall not be accused, without being indulged in the humble boon of asking for testimony to be heard in his behalf. Why, then, are we vexed with a repetition of these grievances?

The other day the gentleman pleaded the prematurity of such a motion, because the accused was only under recognizance for a

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misdemeanor; but, now he stands in another situation: yes, and a bad one, indeed, if we will give faith to his accusers. Go back, Sir, to the practice of this country from time immemorial, and see, if the very instant that a Court directs an accused person to come up, it is not the practice of the Clerk, or the most hard-hearted Jailor, to procure subpœnas? The same is the practice with a committing Magistrate. Every man who appears upon the ground of recognizance, has the same opportunity; whether it be before a Magistrate, or before a Federal Court. Too loudly, indeed, have we admired our liberties—too much have we esteemed our Federal Constitution, if we have not secured our lives, personal liberty, and property; but, on the contrary, must be shut up within the walls of a jail, or held under heavy bond, and not a solitary witness admitted to our relief. And all upon pious, illustrious ground, "he is only accused—his life is not yet in danger." This I cannot bear; it cannot accord with my feelings, or with the feelings of any man not sophisticated by law.

But no bill is found: true, and I hope never will. A remark was made on the amendment to the Constitution, that does not apply:—That he should have the testimony for his trial; but, this was not trial. I thank the gentleman! Sir, we want this testimony for a branch of the trial, which may be introduced in a proper season. We cannot apply it now, it is true; but, we wish to be provided with it, against we do want it. Pray, Sir, do give us your alms when we stand in need: at another time, it might be too late for us to receive the benefit of it. We have an authority in Foster's crown law, p. 246, which defines the word TRIAL. We there find, that trial means any stage of a prosecution whatever, from the commencement to its close. The very first process, is a part of the trial; and, consequently, entitles the accused to every right granted on trial.

But, a most unconquerable difficulty is presented to us, when we are asked, to what day this subpœna shall be made returnable? So, we have proved our right; and, that right we are not to avail ourselves of, because we cannot name the day! Sir, the Court can fix the day for this, or any other cause to commence, and witnesses are to attend on that day; and, by the same power, it may be deferred from one day to another: Else, indeed, we shall experience this solicism—that the thing is granted, without the means of executing it. Sir, give me leave to ask, what would be our situation, if we were to pass by such an opportunity as this? Suppose we should ever be, as I trust we never shall be, before a Traverse Jury—and we were then, after the trial had commenced, to supplicate your Honors for this evidence—what would you say to us? Why, Sir, the same that has been said in other cases—"You should have taken precaution, and have been prepared with your testimony. You are not now to take advantage of your own inattention." In vain should we have asked a postponement; and, the consequence would inevitably be, that we must await the decision

without it. Then our lamentation would be—"Alas! the sun of innocence was ready to shed his bright beams upon us—Oh! that we had invoked him a little sooner; but now we are to be cast into utter darkness, through our own neglect." Impossible, Sir!—Human nature must be changed—justice must be changed into caprice, before a doctrine like this can for a moment prevail in our Tribunal of Justice. Law—justice—charity—reason and religion, array themselves against such a deleterious principle. No, Sir; you will not now turn us off, because we come too late; and, I am bold to believe, that you will not think it too soon.

Let us come to the true point. It is not, whether the President can be summoned: that, indeed, is granted. It seems really to me, that we are so unhappy, as almost always to mistake the original ideas of the Counsel on the other side. I rejoice that I was mistaken in this; because, from that very concession, I mean to derive every correlative support. The President may be summon, is the great canon. I shall endeavour to say nothing which the energy of the case does not demand; but, I must be excused, in asking the worthy gentlemen, if they are not a little inconsistent? Did they not, on a former day, charge us with strangling the light of evidence; and, advise us to meet testimony in full day.—And now what do they do? We ask only for evidence, and they say "you shall not have it." Where, then, does the imputation of avoiding the force of testimony now lie? Not with us.

What is the nature of the testimony asked? Why, first, with respect to Gen. Wilkinson's letter; which, we contend, is material. What is the course pursued, we will ask you, in every case of ten pounds dispute? We ask this upon the same principle, and for the same reasons, as frequently are argued in civil cases. We want to confront Gen. Wilkinson with Gen. Wilkinson himself. There we can shew, if you put it in our power so to do, that Gen. W. in some of his closet communications with the President, is not the Gen. W. that is seen in the coffee-house at New-Orleans, or in the conclave of his friends. We want to shew, that Gen. W. varies from himself in most essential points.

What is our motive? Why, Sir, Mr. Hay has often told us, that every thing of this prosecution depends upon this man's arrival; and, that nothing will be done with the Grand Jury, unless he be present. Gen. W. then, is the *Alpha* and *Omega*, the beginning and ending of this prosecution. And, truly, so he is: for, it is entirely from him, that the little sing-songs and ballads which have crept into all the corners of the United States, have arisen: and, it is he that has, somehow or other, corrupted the people of this country from those impartial impressions which they were wont to possess. In substance, Mr. Hay says, that the funeral pile is prepared, and it wants nothing but the torch of Gen. Wilkinson to set it on fire. Sir, we despise every effort which he can make upon fair and honorable grounds; but, we are afraid of those efforts which might be made by *desperation*: there is our true fear? *Des-*

paration is a word of great fitness to express the state of such a man. This man has declared, that he has discovered conspiracies—that he is the patriot who has quelled them. And, what will be the catastrophe of Gen. W. if all this is not true? The great expense of military preparation—these wide-spread alarms—this extensive spoliation and destruction, under his order, and under the orders of the government—How will this wonder-searching government feel, unless Gen. Wilkinson should prove what he has promised to the Executive? And suppose, Sir, it should all turn out different to what he has represented it; policy and ambition should prove to be his aim; and every stupendous prospect which he has raised, receive a general crush—how great will be his confusion? I think some newspaper told me, that he is no longer viceregent of Upper Louisiana. I think that this Commander in Chief himself, after all his exploits have turned abortive, will be in that much-dreaded situation of—*a private citizen*. I do not say that he will, with undaunted front, march up to the Altar of Justice with perjury: but this I will say, that human nature must be more securely, more strongly garrisoned by religion, and obtain more reinforcements than I have ever seen, to part with all these dignities with impunity, and be reduced to the dust and ashes of confession. Sir, as sure as man is man, storm and tempest will cover this man's western glory, and gather thick darkness all around him; if he does not, by his oath, keep himself fixed with the General's staff in his hand. Can he bear obliquy and reproach? Will he condescend to be the victim of popular ignominy? Then, Sir, have we not just cause for minute enquiry into all these dark circumstances? We must trace him in his public and in his private walks—we must trace him in his most confidential walks—and that is in the beaureau of the President. We have been gratified with a glimpse of what we are to expect from him; but, we cannot yet, get a fair and full view. What success we shall have in our researches, we know not.

Well, they admit that the President can be brought to this place. He appears here, and we ask him, "whether he has received a letter from General Wilkinson relative to Aaron Burr?" "Yes". "Did not that letter state to you, transactions of a certain nature, different from what he said at another time"? Would he dare, in point of integrity acknowledge it? "Have you that letter in your pocket?" "I have—but I will not deliver it!" Ah, Sir, here is the point of distinction:—Is the President here like another man? Is he bound to act as I should, standing in his place at the bar? Then, Sir, of what avail is it to talk of the independence of the Judiciary, if you will suffer Thomas Jefferson to stand there mute and refractory? I shall begin to think, that what we have esteemed as the sheet-anchor of our liberties, is lost, if we yield to this etiquette. What do they, in effect, tell us? You may come into the porch of the Temple, but you must not go into the *sanctum sanctorum*. Ask him what you please, but do not compel him to take the letter out of his pocket—that contains a something which is not to be seen.

Sir, there is no precedent within our jurisprudential research, that will sustain the doctrine, that a witness shall be allowed to keep back a letter which he has in his possession. If, then, it is conceded, that Thomas Jefferson is to be a witness—it must, of necessity, and by every rule, be admitted, that he is to bring every piece of information with him which he might possess.

A distinction which I mean to review, has been made between this and a private case. A respectable gentleman has admitted, that all material papers, not compromitting the national safety, might be demanded. A gentleman has this day given us an eulogium upon himself and his associates, by saying, that they do not wish to suppress any testimony. Then, Sir, why will not that same professed candor and liberality extend to silence their opposition to our claim? One gentleman declares his wish to be, to prevent any capricious ravaging of the archives of State. Now, Sir, if Mr. Burr was to ask you for every book, communication, document, or papers in the President's possession, then the demand must perish of itself: nothing is farther from our ideas: but, we come to the identical papers that will benefit our cause. But, says Mr. Hay, you shall have these papers, provided the national safety will not be endangered. The national safety! How, Sir, I pray, can that be in danger, by shewing Wilkinson inconsistent in his declarations? How long is it since he has become the *atlas* upon whom the political existence of America has been sustained? Sir, if General Wilkinson was *annihilated*, still there would be ten or twelve feet square of the land of freedom left: would there not? If, however, condemned to *eternal* infamy, would not the government go on? I am sure, if he be so very important, it might be in his acquaintance with all the plans of the government, for accomplishing this great work of solicitude, in which we are all engaged; and, this is an end, that I am sure I do not wish to insinuate his agency in. Now, I am inclined to believe, from what little knowledge of things I am able to compass, that, after viewing the meredian of his glory—the homage that has been paid to him in the western quarter of our country—after demanding almost to be worshipped—I will not say that he shall not be our political Messiah; but, I will dare believe, that if he were *crucified*, it would make no considerable æra in the history of our time. Sir, what is the situation of Gen. Wilkinson, I will again ask? There must suspicion rest upon him. He stands in the character of a reprover, whilst he himself is confessedly guilty; but, to what degree, has not yet appeared. He cannot save himself from the inevitable consequences of that guilt, unless he can hit upon some expedient to throw the blame somewhere else. He has informed the President, that he did countenance these conspiracies; and, unless he can throw the guilt on some one else, that guilt must be made manifest to his total downfall. And, yet, we are not to be provided with means to detect these designs, pointed at us!

We are told of the danger of exposing State-secrets: and, of

some confidential characters, perhaps, being exposed by this letter. *State-secrets!* I heard one gentleman, with much pleasure, renouncing all regard for State secrets. I see in the eyes of every man about me, an abhorrence at the name of State-secrets. But, I will not go so far as that gentleman has done; for, I do believe, that there are some State matters, at times, that ought to be kept secret.

Mr. WIRT. I always thought that there may be some circumstances that might require secrecy. And of such a class is this. Communications between General Wilkinson and the Executive, respecting the threatened rupture with Spain, or respecting any persons or circumstances engaged in Treasonable projects, are necessarily State-secrets.

Mr. E. RANDOLPH. Well, Sir, the next thing to State-secrets, is, "where national safety is in danger." Merciful father! *National safety!* That it is to be in danger when this arch-witness, this foundation of the prosecution is called here to give testimony of what he knows. National safety! Why, surely, the national safety would be in no danger of annihilation, were this gigantic witness left in the dust. Well, then, it is not Gen. Wilkinson at last, though he is given up to us to be buffetted; but, it seems, that some body else, yet behind the scenes, must not be exposed. Sir, I should really be sorry if any names were to be improperly brought to light in this correspondence; but, Sir, are the names of A, B, C, D, E, F, and G, to be avoided, on the mere paltry ground of delicacy, when our life and our liberty are in danger? If these men are innocent, they can prove it; but, if they are guilty, it illy becomes the government to screen them, by bearing the charge upon us. Sad expedient, to deprive us of the means of defence, to shelter guilty men! Sir, whenever the Executive beaureau is to be made the depositary of slander and persecution, and the shelter of guilt, I care not how soon it is broken up. I wish not to ever see it, as that of France of old, a register of the characters of men, where was inscribed the name of every criminal who suffered from State policy. That we should be deprived of our legal rights, lest it should hurt the feelings of a few others, is a doctrine that never has been admitted in the Court; and, I trust, never will be. No place, no characters, no papers are sacred to a Court of Justice. This was particularly urged yesterday by Mr. Martin, when he adduced the case of Lord Barrington.—The Court determined not to listen to his pressing intreaties to be exempted from answering, where he might expose the infamy of her who had intrusted herself to his care. But, Sir, I saw within these walls, a case infinitely more affecting. I saw a young son arraigned, 16 years of age, charged with a capital crime; his heart rent with agonies, approaching nearly to madness; but, seeking the relief of a momentary comfort, he turned his eyes towards his father, who anxiously came to witness the fate of his unfortunate son. When he was on his trial, all the efforts of the Government were unavailing to come up to

the charge, notwithstanding they hunted far and near. At last, the keen, discerning eye of the Attorney, turned upon the unhappy father. I was his defender. I do not know that I reasoned on the subject; I gave way to the piercing feelings of my soul; I saw the Court affected; tears streamed from the eyes of the Judges, when they passed the solemn opinion that forced the trembling father to come to the book. In the name of human nature, thought I, what an awful circumstance! However, the ultimate result of it was, the young man escaped; and, not a page of our history can exhibit the gibbeting of that young man. Here we have a decision, that not even the tender feelings of a father is to withold the guilt of his tender offspring before a Court of justice.

And, is General Wilkinson the child of the United States—is this the man who is to be so protected? Is this father, (Mr. Jefferson,) not, as the natural father of whom I have been speaking, to be forced to give testimony, lest it should cause those paternal pangs in his breast, at being called upon for documents which justice requires of him? We ask for a rule—we ask for a law in this case. And what is the law? Why, Sir, every man is to give evidence when called upon; except where natural defection, legal professional integrity, or interest in the case, shall forbid; and, where either of these are made to appear, the evidence would not be legal.

What is the next criterion? Why, that this paper should be material. Now, with respect to this, we have performed a work of supererogation—we have produced our affidavit, when no affidavit is legally necessary to draw from us what a witness knows of a fact, or to obtain a disclosure of a paper which a witness has the command of. And why we have added this, is to save the President the trouble of coming here, if he pleases to send the letter. On this ground have we taken measures for a subpœna *duces tecum*, and this we have a right to: we have a right to it, as an appendix to the witness himself. Sir, I claim this from Mr. Jefferson's pocket, as much as I should be justifiable to claim it from Tom, Dick or Harry's pocket. Without this process, we could not obtain the paper; but, by this, we demand it. I said, that an affidavit was not necessary to obtain this process.—I believe it, because I cannot find a single *dictum* to establish the right to an affidavit. But there is reason for it, because a man might suspect that the testimony would be useful to him; and, because he cannot particularly describe it, he shall not be precluded from the use of it. And so it is here. We know not the particular facts of the letter; but, it may operate instead of living testimony, relating to some circumstances with which we are connected. Sir, how can it be expected that the affidavit can be precisely in point? Affidavits must vary, according to the subject-matter and means of information which the party possesses. Now, suppose Mr. Burr was to swear that this letter contains such and such specific matter, would you not scout the idea—knowing, as you do, that its contents are no farther di-

vailed than in the communication to Congress? How, (is the question), do you know it relates to Mr. Burr's case? Sir, we have only the words of the President himself. Yes, he has named Mr. Burr in that letter; and, in such a way, that I shall say it is one of the few acts of his Presidential life, which I must always condemn. Whilst I esteem and venerate the man as my friend, and as an expounder to politics which I approve, yet I can only take him where he is right—where he is wrong, I must leave him. We know that Mr. Jefferson declared, that this letter was received by him from General Wilkinson; that it related to Mr. Burr's transactions; "*of whose guilt,*" says he, "*there can be no doubt.*" The President, says, he has written at large to him respecting Mr. Burr; and, in some of those things, we have "no doubt" we shall trip him up. Is not this a reason, Sir, why we should ask for the letter?

But the guilt of Mr. Burr will be made appear by that letter. Sir, who knows that—the President? It seems he does; but, I am not inclined to pay such deference to Mr. Jefferson's opinion as all that: he may have drawn his inference; but, I fear not to examine that point for myself. I will not follow him in blind deference. I will not, for one reason; because I would teach every executive officer, that he has not a right to give any opinion upon the subject of guilt. Cannot he be satisfied in transacting his executive duty, without being a Judge, and pronouncing judgment upon him whom he calls the principle actor? This was not required of him by the Legislature; they would have been satisfied to have heard of facts and persons, without hearing his judgment on those persons. If it were for no other reason but this alone, we certainly should be justifiable in asking for the letter.

But, Sir, a copy is enough, they tell us. It is true, that a copy would, in most instances, do as well as an original; but, for our purpose, it will be but half a gratification. Suppose Gen. W. was here. He is asked—"Sir, you wrote such a letter, did you not?" He makes no answer. Presently the letter is shewn to him. "I did not," says he. But the law says it is your letter, and you shall not deny it. He would not wait long for the effect of that remark. He would look towards Washington—he would cast his eyes upon the government—ask himself, "what if I refuse to answer and acknowledge this letter?" Ah! on the other side, his conscience trembles, and fear agitates him! But, Sir, let him act as he would, I would ask—Was there ever a capital conviction upon the copy of a letter? In some cases, I admit it will answer; but, will it in all? I do not now refer to the ancient patriots, where papers found in their closets, and various written testimony, availed to their conviction.—These were days of tyranny, indeed. But, I ask you, whether it would not be optional with him to deny, or not. There might be an inducement to call for his acknowledgment; but, how can we depend upon it. But, what, if we were upon the moment of trial, and he should deny it? Could we ask you to dismiss the jury, until we could bring

the original? Sir, every objection would be made to it, and with justice. And, if even he should at that moment acknowledge it, I need not tell lawyers the obstacles that would be thrown in the way of our availing ourselves of it.

Now, I really think, that so anxious ought Mr. Jefferson be, to promote public justice, that he ought to hasten to produce the original letter. I hope, for his character's sake, that he will do it. If he does not, there will be attached to his name, an odium which, I think, never can be obliterated. I would almost ask it for his sake. If gentlemen ask why we did not demand it before, we can answer them, that our hopes were so unpromising from the rebut we received from Mr. Smith, that gloomy indeed were our prospects, except the orders of the Court were given.

Mr. R. here recited the particulars of his application to Mr. Smith, Secretary of the Navy, for a copy of the orders; to which he answered, in positive terms, that a copy could not be granted; saying, that the orders were intended for the officers alone who had to execute them. That thereupon, he wrote a second time, stating that he could not suppose there could be any secret in a paper which had been printed in the Natchez Gazette. This ended the correspondence, and nothing more was heard of it.

Now, this answer, continued Mr. Randolph, was written a considerable time after it might have been written; and that time, no doubt, was spent in consulting with the Heads of Departments and the President: enough to discourage our personal application again! We know, from experience, that it would be in vain; and, yet, the inconsistent question is asked of us, why we did not apply? I hope, therefore, that we shall be excused from applying to the President: when one of his officers refused to send it, and another would not even let us look at what he possessed: for a copy is now in the hands of the Attorney.

But, it is said, that this letter is confidential. As to this, I do not know; but I must recur to the President; he has ears and eyes as another man: and, I trust, he possesses the feelings of a man. As he may be a witness, I trust, Sir, that he will withhold no communication, although it may be confidential, to the injury of an accused man. It cannot possibly be of such a nature, as to justify its refusal on such an occasion.

Mr. Hay has been pleased to call the affidavit farcical, because no fact is stated, but merely an opinion. I wish he had been so good as to tell us, how he would have had it written. We cannot justify an assertion, as to what the letter contains. May not the opposition which is made here, justify the impression, that there is something more in that letter than is disclosed, or than they would like to see exposed? This conjecture, of something being held back which ought to be seen, will be removed if we obtain our motion, and every thing will see open day. Mr. Hay says, that we have got all we have a right to expect. We say, that we have not all that

we want; that there is something yet in the holy of holies which we require to go before a Court and Jury. Sir, I must ever contend, that the *cabinet* itself is not too sacred, where the dearest interests of a fellow-citizen are involved.

Observe, Sir, what the consequence of these Cabinet-secrets would be. I know that the gentleman would disdain to do any thing that would be injurious in its effects, if he were sensible of them. Would you, Sir, put it in the power of any President on earth, to deliberately hunt down man by Proclamation, declaring him to be guilty of Treason, and give him but a very partial opportunity of defending himself? I have always thought, that some time or other, an Executive Magistrate might become more formidable than he ought to be; and, will not this indulgence of Executive secrecy, put an engine into the hands of some future President to destroy his enemies, (at least, in the opinion of the people,) by giving only partial facts and proceedings to their inspection, whilst he promulgates his most unfavorable opinion of the supposed, or proscribed actors?

Mr. Hay, indulging himself in little criticisms, says, when looking at our affidavit, "*may be* material," means *may*, or *may not* be material. As to his sentiments on this, I am indifferent: Mr. Burr believes it will be so—he has that impression on his mind—and, with that impression, he makes the affidavit; which, in my opinion, is fully adequate to all the purposes desired.

Yesterday we heard something about unmasking defence. Do gentlemen suppose that we shall go so minutely into circumstances, as to expose our ground, that they may avail themselves of our weakness, and prepare their answers before hand? This is an unreasonable expectation, indeed. We will now only give the reasons, principally, for which we want this letter; which is to shew, that Gen. Wilkinson is grossly inconsistent in his disclosures: and to say, that he will be contradicted. It is impossible for us to go any farther, whilst the contents of the letter are unknown to us. But how do we guess at what we have hinted of its contents? Why, the First Magistrate of the Union has declared his guilt; he has unfolded some principles, which makes it material for us to see the grounds of, in order to shake those unfounded opinions.

Mr. Burr's affidavit is not to be attended to, because he might have been misled by his feelings! Sir, is not this always the case? Was it ever a source of objection to any thing that fell from an accused man, because he was interested? Because he is so, he is the more earnest certainly to declare to the world his injuries, and plead his innocence.

But, Sir, I cannot pass over that part of the argument relating to these orders, wherein my friend, Mr. Martin, was charged with "speaking treasonably." This has, indeed, raised an amazing clamour amongst us. When I was up on a former occasion, I stated the fact, perhaps not strictly correct; however, it was in the way it was represented to me. But now I have a view of the cir-

cumstances, not less odious. I now see that it related to an order given to the military of the United States to lay hold of, and destroy Mr. Burr and his party, and to seize all their property. Now, whether these were the exact orders or not, I still am not certain; but, I believe this statement of it, is not far from correct. Sir, the refusal of the orders tell me, that there was a something in them which lurked behind; else why does not the Attorney shew the copy which he has in possession? Mr. Martin, as I understood him, never intended to say that he should justify Mr. Burr, under the colour of these orders, in opposition to the government of the United States. Whatever Mr. Burr did, we shall contend was legal, and not in opposition to the authority of the government. My ideas, however, are these: that if the President had called forth a military force to destroy the person or property of any man or men upon earth, without positive legal authority, that man or men had a right to resist. What, Sir, do we mean by the term *usurpation?* Why, the want of regard to legal authority in exercising a power possessed. If therefore men have been called out in the manner stated, (which I do not vouch for, not having seen the orders) we certainly have a redoubled reason for asking for those orders; and if they were so given, I say that they were unconstitutional and unjustifiable; and, not only Mr. Burr, but any man affected by them, ought to have opposed them.

Let us enquire what are the circumstances under which the President can call out a military force? *Invasion by a foreign nation.* Was here any invasion? *Insurrection in a State, upon the application of the Legislature; or, when that Legislature is not in session, upon the application of the Executive of such State.* Now, Sir, were these orders given for the destruction of Mr. Burr in consequence of the application of any one Legislature in the Union, or of any Executive, calling for aid? No, Sir, not a scrape of a pen appears from either of those components; and therefore, as these are the only two sections which provides for the calling out a military force, if no such applications did take place, it must be declared illegal. There is however another cause, which I had passed by, which is, where an infraction of the rights of nations shall take place by armed vessels on our coast. Now nothing of this kind certainly appeared. And, Sir, if these be the only three instances to authorize the calling out an armament, then I will say that neither of them occurred, and therefore the orders were unjustifiable and illegal.

Judge MARSHAL. Is there not a power given in the 3d section of that law to the President to call out a military force if any person within the United States or its territories should begin, or set on foot any armament against a foreign nation with whom the United States are at peace?

Mr. WIRT. The act of Congress of 1794, expressly requires the President to employ the military force for the purpose of suppressing or preventing any preparation of the sort.

Mr. E. Randolph. I wish to see that law. My conviction at the present moment is of a contrary tendency: but it is a most important point. If I am to be overwhelmed by a giant, I like to meet him at once.

A conversation here took place as to the wording of the affidavit; the Court proposing to substitute the word *will*, for the word "what." This was acceeded to.

Mr. Botts said, that as Mr. Burr did not know what evidence would be introduced against him, he could not pretend to say what bearing this affidavit would have on the testimony, and therefore its vaguity was desirable.

Mr. M'Rae. The question now before you, Sir, is not as to the guilt or innocence of the President; but, it is, whether they are bound to shew how the document will bear upon the issue. The letter from Gen. Wilkinson, they say, is intended to confront him when he shall appear here. The position implies, that he will say something in opposition to the letter. It is said that the letter contains certain facts: we suppose it contains a narrative of the guilt of the prisoner. Then Sir, if he does not, when he comes here, testify facts which tend to the innocence of the prisoner, there can be no confronting! If he goes to facts on the guilt, then the letter will not confront him. The *prima facia* appearance of this, therefore is, that there can be no confrontation.

Mr. Wirt. Here is the law which I was looking for, and which bears out my construction. It is an act in addition to an act for the punishment of certain crimes against the United States, sections 3d, 5th and 7th. "The navy or army of the United States may be called out to take such ship or vessel &c. &c.—*and also for the purpose of quelling any force raised for the carrying on any expedition against any country with whom the United States are at peace*".

Mr. E. Randolph. Well, Sir, the applicability of these orders to the law, is what we have to examine; because we declare, that if the orders were not justifiable by law, in principle and operation, we should have a right to resist them, (though we do not admit that they were resisted by Mr. Burr), and upon this ground also we claim a right to see what the orders were.

With reference to the law, as quoted, wherein does it meet the case? Are we charged with beginning an interprize or setting on foot a foreign expedition against any nation at peace with our country? We deny the fact altogether: but, if it had been so, there is no power granted by law to the President to call out forces to prevent the *commencement* of any such expedition—but there is to the *carrying on* such interprize. Now, Sir, here is a material distinction. When a design is in its commencement of operation, which might endanger the peace of the country, the law believes it sufficient, that the party concerned should be prosecuted in a Court of law; and at this stage of the business, he may be bound over or imprisoned until trial; but, when any expedition is to be stopped

by a military force, it is necessary that it should be already commenced, and *carrying on*. Now, Sir, I will suppose, (though I deny the reality of the fact) that Mr. Burr should have begun any expedition; that he had prepared the means by vessels, ammunition, men, and all the equipments—would the law in any way operate upon him? No, it would not; because it was not *carrying on* any expedition. Gentlemen in their construction of penal laws, ought to be very careful; and particularly so, when the punishment extends to life and fortune. There is no necessity to enlarge in this stage of the case, since it must be evident to every man, that there is no applicancy.

But it is farther suggested, to be rather indecent to ask the President for these papers.—Why not ask the officers of Government? This has been partly anticipated, because one of the officers was asked, and refused. But, there is a greater reason, as that all the Secretaries are bound to comply with the commands of the President; and, if he says so, the orders must be produced. But, as to the letter, it is undoubtedly in the President's possession; for, as far as we can discover, it is a letter directed to him. Now, Sir, it must be clear that the President, upon receiving such a letter as this, part of which he thought proper to withold from the Legislature, put it into his beaureau,

What is to be done with the letter after it comes here, supposing there are some parts of it which are not proper to be exposed? Why, really, this is a strange objection. Because there is a letter which *might* have something secret in it, that we should be precluded from the benefit of such parts as might materially benefit our cause! There is an extraneous mixture. Why, Sir, cannot the President accompany it with a recommendation, (if he should think proper to send it), that certain parts of it, not affecting the case, should be withheld from exposure? This would not withhold from us any important parts, and would answer the purpose.

I must make a remark or two, Sir, with respect to your exhortation, and what was said yesterday and to-day. We were charged yesterday with having a particular policy in our defence: it was said that our object was rather to create invective against the administration, than to defend Mr. Burr; rather to support a controversy between Mr. Burr and Mr. Jefferson, than to come at the truth. Hints were also given as to popular opinion. As to our policy, it would be improper for us to explain every thing at large: our cause requires of us to make our defence in that way which *we* deem most effectual. Sir, I never mean to defend my client by popular prejudice. Indeed, I know it is in vain on my part: I know who has got to the windward of us in this, they having *the people* on their side. I know how impotent is one individual, when opposed by that rock—*Government*: and, yet I cannot but entertain a slight hope, that the arguments we have been forced into, will have their due weight with those who hear us. I do hope, and believe, Sir, that this gigantic magnitude of the crimes charged

against us, is diminishing day by day; and, that we have little or nothing now to oppose, but *that man* whose ALL *is at stake*. Sir, I rejoice in a well-grounded confidence, that, if the ungovernable dominion of prejudice can be broken down—that if you can chain him down to the law, and not let him rove at large—we shall remain in safety.

Mr. WIRT. The respect which I owe to this Court, would prevent me from asserting for law, what I do not *know* is law. The gentleman has enumerated three cases, wherein an armed force could be called forth. He then sat down majestically, and demanded to meet the giant at once. I had mentioned the law before, and I afterwards pointed to it. I think that law goes to the full length which I expected it. Sir, I feel my own candor impeached by that course of proceeding. Having produced the act of Congress, if there should be any doubt of its going the length I ascribed to it, I should wish to be heard farther in the argument.

Mr. E. RANDOLPH said, he did not mean to make any personal triumph over Mr. Wirt; although he had said, he did not know a law to exist that was applicable. This clause was then introduced, upon which he still contended that there was no justification to call out a military force.

FRIDAY, June 12, 1807.

Mr. MARTIN. I will now, may it please your Honors, proceed in a few closing remarks; in which, I shall endeavor to avoid advancing any extraneous matter. It has been said, that this is a motion directed to the discretion of the Court.—This was said uniformly by the gentlemen whom I oppose; and, I admit, in a degree by those with whom I act. I have repeatedly been called upon to say, whether, in my practice, I have ever known a subpœna *duces tecum* issue in such a case as this? The gentlemen will excuse me, when I refer to the Maryland practice; but there I never knew the party apply to the Court at all; it has always been taken out at the Clerk's office without their knowledge; and afterwards, when the Court were in session, they informed the Court that they had so proceeded; upon which the Court examined the process, and the necessity of the testimony. This is the only mode pursued within my experience of 30 years. But, Sir, farther. It never was known in practice, that the Counsel against whom this testimony was wanted, took a part in it to throw obstacles in the way. It would have been thought indecorous—extremely so. There is a material difference in the two reasons alluded to, upon which this process might issue: the one is a want of testimony—the other is on a motion of continuance. Now they call upon us to shew to the Court our reasons. What right have they to dispute our want of testimony? They know our aim is not to postpone the trial, or to delay the examination, but to obtain testimony. In England I admit that the practice is, that where a party wants evidence, he applies to the Court; and, if they think it ought to be produced, they

make a rule for it: but is there ever such a question there as to enquire whether the party is entitled to it or not? No Counsel ever pretends to interfere as to the mode by which evidence gets into Court, whether it be written or oral. What is it to them what testimony we mean to introduce, until it comes before a Court and Jury.

The gentleman objects to the form of the deposition. My answer is, first—that I never knew a deposition to be required. Many cases we find in the English books, as Blackstone 2, and others, where paper have been produced in Court; but, we hear of no such things as affidavits on the subject. How then can he say it is not necessary? But if it were necessary, let us examine whether this affidavit is not fully to the purpose. "*May be material*," does not meet approbation. Now, I should humbly give, this is fully sufficient. But no, say they, you ought to say that it *will* be. Why, Sir, perhaps these papers never will be used by us at all; as they surely will not be, if Gen. Wilkinson does not appear and give testimony. If he comes here, they certainly will. How then can Mr. Burr swear that they will be material, when he does not certainly know that Gen. W. will appear in Court? We want to compare his declarations with what has been sworn to by him. Now, suppose he has given a long history to the President of all that he knows or can discover of transactions to the westward; have we not a right, in order to guard ourselves against that testimony, to examine how far it is consistent with itself, or with any thing else written or said by the same man? Suppose we know of any person to whom he has given any other statement in writing on this subject, should we not have a right to procure the production of such evidence? Yes, Sir, we should; and, if that person should have lost such a paper, it would be legal to obtain his verbal description of its contents. Then, Sir, this is the case as respects the letter to the President. It is admitted that his dignified situation cannot prevent his appearance before the Court, and that he is answerable to law the same as any other man. Then certainly having the right, we may fairly suppose that he would never hazard the life of any fellow-citizen by neglecting to bring the paper with him; but, if he should, we would have a right to prove by him the contents of that letter.

There is a distinction held up between this letter and others, on the ground of State-secrets. I ask, what State-secrets can be contained in a letter from Gen. W. to the President? Is a professed knowledge of Mr. Burr's projects a State-secret? But, it is said, that it might hazard the exposure of some names of persons who were concerned in the same wicked conduct with Mr. Burr. And, should this be a screen made up to protect others at the hazard of Mr. Burr's life? Innocent men cannot suffer by any exposure; and, guilty men deserve to be exposed. Sir, shall envy, hatred, and malice, pour its poison into the Executive cabinet, and not that cabinet to be examined to protect the life of a fellow-citizen,

or to vindicate his innocence? Should that sacred place be [illegible] the *repertorium* of a Spanish inquisition, that might destroy, u[illegible] the sanction of its power, whilst the names of informers are ne[illegible] to be given up; and the victim is to be put upon the tortur[illegible] wheel, till at length he is to end his sufferings at an *auto de fe*, u[illegible] cause he will not charge himself with guilt, when he is innocen[illegible] It is upon this letter that government have thought proper to mak[illegible] denunciations, and hold up persons to suspicion. It is upon this Sir, that persons and property are made subject to one general destruction! It is upon this letter that witnesses have been sought out—not such as would depict the true situation of the case, but *exparte* to convict the prisoner, right or wrong; and, not only have they induced persons to go before Magistrates by persuasive means, but if they were unwilling, an armed force was at hand to carry them there; where they have made affidavits, which they [illegible] now adhere to, however unwillingly submitted to. And do these agents of government take any testimony in favour of Col. Bu[illegible] No, Sir, but unwillingly some have been dragged a thousand m[illegible] from their homes to support these extorted declarations. And this the way in which an American citizen is to be tried? I a[illegible] really surprized that gentlemen will advocate doctrines so contra[illegible] to the rights of civil society.

A very respectable gentleman took up the President's Message from which he read a part, to shew that this letter must have contained secrets; or, what he was pleased to call confidential parts. I should really have supposed that, from any apparent evidence which he possessed, no name ought to have been mentioned. I am not displeased with his quotation; because, it has led our view to this mask of guilt, which is pronounced (unfounded, and extremely improperly), upon the honourable gentleman which I now attend. "His guilt he pronounces to be beyond a question." After which, he recites the different progress intended to be made by my friend in his expedition by taking New-Orleans, &c. And how has all this vague, undefined conjecture, been collected? By persons, the President says, "not under the sanction of an oath: frequently from rumours and suspicions which makes it difficult to sift out the principle facts." There may have been, we are willing to admit, reasons therefore, why the President at that time might have thought it proper to keep back information and particulars, even from the Legislature, which he cannot excuse himself for now. At that time this vast design might, in his opinion, be going on; and characters might properly be hid, as well as measures, that there can now be no necessity to keep from view. That day is now passed away, and I know of no necessity of concealment; because, I know of no person against whom the government intend to proceed. Some measures have been taken against Gen. Wilkinson as a military despot; but, it is equally true, that we hear no more of it now. On these accounts, we see no reason why the letter should be withheld from us.

But, suppose there should be any State-secrets in this letter; is that a sufficient reason for withholding it from discovering the truth of character, and clearing an innocent and injured man? We want to discriminate the true character of Gen. W. to see whether he has acted consistently or not. If any thing be then of importance or not, relating to other things, it is not necessary that such parts should be read in Court. They might direct them, wherein the names are involved: it shall not be made a subject of inspection. In short, the Court can decide upon the whole contents of the letter; exposing such parts, and withholding such parts, as are proper in their view. But, I will repeat my impressions of it; which are, that there is no secret which cannot now safely be disclosed, whatever might have been: and the mere possibility, is no argument why we should not possess it as testimony. But, our all must be left at stake: we are not to have it, because we cannot define how it may operate upon our case. Can gentlemen be sincere in preventing us?

Mr. HAY. So far from that, I have done all in my power to obtain it; and, of this, I have informed the gentlemen; but, they appear not to be disposed to credit me.

Mr. MARTIN. I thank the gentleman for the service he has endeavored to render us. I give him the credit of it; but, yet, we must be indulged to presume upon the possibility of a disappointment; and, indeed, he has told us, that he will not let us see the papers when they come; but, he will give them to the Court. Now, were we sure he would succeed in his application, I should be disposed not to trouble the Court with this motion. But, should we be disappointed, I must again repeat the question—In what a dilemma should we be found? Here would be our client at the Bar, and it would be absurd in us then to calculate upon a postponement. Besides, if we are not now indulged with them, how could we expect it then? I have always said, that I fear to trust for a favor from an adverse party. I cannot trust so far, Sir; and why should I, when we are indubitably entitled to them? Why should we not have them?

But we are told, that there ought to be a degree of respect shewn to all the departments of government. And do we evince any disrespect? We only ask for a subpœna, to be served on the Executive, who is said to be as amenable as any other person. We only ask for certain documents; and, I am sure, he will not consider it to be disrespectful, that we should ask for them. But, what if it should be construed into disrespect? Is the life of a man, (lately high in public esteem—I cannot say the first citizen of our country, but I will say the second), to be put in jeopardy, without using my feeble endeavors to save him from the danger of his situation? Though he might be now in private life, yet the versatility of our fortunes are such: but, our claim is equally the same. I cannot indulge, in such an hazardous situation, any false complaisance;

but, must expect the assistance of even our First Magistrate to the forwarding of justice. Our reasons are self-evident for asking this boon: we want to test the evidence that will appear against us. We fear nothing but perjury, downright perjury: free us from that, and we will defy the world. Sir, we approach, with uplifted hands, the sacred sanctuary of justice: we approach it, not to be screened from guilt, but to be screened from the shafts of our enemies—from persecution. We shelter ourselves beneath that alter where we can, with confidence, look for protection. And, Sir, will you give us up? No, Sir, we know that you will not.

But, we are told, that an office-copy will do as well as the original. To be sure, it goes to prove, as far as it will prove any thing, that there is a copy in existence; but, does it prove that there is no forgery in the case? Does it prove that this original, which we are not permitted to see, is the hand-writing of Gen. Wilkinson? Will this office-copy be able to detect perjury or libel? A copy never will be evidence against a person for a libel, however authenticated. But, in order to get over this difficulty, it was said that Gen. W. would dare not deny it. Sir, do we not know that this very man has violated already, what he ought not to have violated—the Constitution of the United States? Has he not exercised a military despotism; and, is not this one of the principal acts for which he came here to justify himself? And, can we doubt, that a man who has been guilty of a series of oppreffion and bad actions, will hesitate to add more to them, by endeavoring to cloak them from view? I admit that it is a right policy for the Counsel of the United States, to hold him up as a Divinity, because he is the pivot upon which the whole prosecution may turn; because, as he has confessed, without him he cannot send up his Bills to criminate my friend. But, Sir, Mr. Burr has not that opinion of his integrity: we cannot place our confidence in his veracity or his honour. Mr. Burr fears to hazard his life or liberty upon the purity of Gen. Wilkinson's actions. No, Sir; he will not commit his fate to the breath of such a man's lips. But, says the gentleman, if he should deny it, we can send and get the original. And so, Sir, the fiat of our life or death must be given in charge to the Jury, without that testimony which might change the verdict, and prove the innocence of the accused, when it can be previously obtained! As we have said before, it will then be too late.

The gentleman has asserted the idea, that we have made this motion on purpose to have an opportunity to glance at the President; and, that it is replete with indecency and indelicacy so to do. But why should they think so? No, Sir, it would be too dastardly an act for me, to make a Court of Justice the place of exhibiting the improper measures of the government, when they were not necessarily attached to the case. But, am I not to be allowed to talk of those acts of the government, which have reduced us to the necessity of a defence? The gentleman has told us, that there ought to be a high respect shewn to Official Departments.—By this

it would appear, that we disapproved of that high respect. Why, certainly, I once thought so too. I thought that the Executive, Judicial, and Legislative branches of our Government, were entitled to our veneration; and, that all the persons holding offices, ought to be treated with decency and respect; but, I always thought, that their official conduct was a just subject of criticism. If, Sir, I have a different opinion now, I owe it to the gentleman, and those associated with him; and, therefore, he must not think me extremely wrong; particularly so, when he was at one period as devoid of that respect to official characters, as I now am.

Sir, as to the orders issued from the war and navy departments, we have already expressed our reasons for wanting them; because, if any opposition should be attempted to be proved, we may have our resource, by proving the illegality of those orders in calling out the forces without law; and, therefore, resistance was justifiable. But, the gentleman says, that we have no right to say whether they were legal or not, because we are not trying the President. God forbid we should! But, Sir, we are trying the person who was stated to have formed an armament to oppose the orders given by him. Now, will they pretend to say, that we have no right to oppose any laws, however arbitrary and unjust? We must, indeed, or otherwise feel the weight of the Presidential "*edicts*," and know that it is only the duty of the officers of government to register them, as in France: that country once so famed by these gentlemen for their progress towards liberty. But, Sir, if we are to submit to whatever orders the government shall choose, however unjust and and unconstitutional, we are as much under the arbitrary pleasure of that government as the inhabitants of Turkey, ancient France, or France now under the despotism of Buonaparte. Where would be our boast of our liberties? Where the political advantages to the inhabitants of all parts of the globe, who have emigrated from the despotic sway of their native government, to seek an asylum here? Sir, I will explain myself as to the resistance of the power of the President. I conceive his power might be resisted upon the same principles as a common Magistrate ought; and, that it is at their peril that any persons undertake it. If a person resists a legal order of the President, or if a person resists a legal warrant of a Magistrate, he certainly must suffer for it, because it is a resistance held up against the execution of the law. But, if it should turn out to be a resistance against Gen. Wilkinson's arbitrary and unauthorised ambition, or if against illegal orders, issued without the authority of the law, there can be no crime in it.

Mr. HAY. I am sorry to interrupt the gentleman; but, from the drift of his argument, as well as that of all concerned with him, it appears that the ground which I had taken, as well as those concerned with me in the prosecutinn, had been entirely misunderstood, and had never been hinted at, that the orders of the President could in no instance be resisted.—Such a proposision would certainly tend to as complete a destruction of our govern-

ment, as could be conceived; and, would place our liberties as far from us, as were those of France or Constantinople. What they had said was, that information had been laid before the President of the United States, that a dangerous conspiracy and insurrection was rising in the country; which was termed by some, to be an expedition intended against a nation in amity with this country; which, if carried into execution, would certainly plunge us into the horrors of war. Upon which, these orders were issued, calling upon the military and naval departments to suppress all unlawful proceedings of the kind, and to prevent any foreign expedition from escaping. Now, such being the case, we contended, that it was improper and unlawful to oppose by force the execution of these orders. No person, upon any principle, had a right to oppose the execution of that precept; and, every act of opposition with an armed force, if it would not be Treason, would at least be an high misdemeanor. Now this is very differently represented by the gentleman. It is construed to be an order to take Mr. Burr, or any others with him—to put them to death—destroy their property, and the like. There is an essential difference in any opposition to the one and the other of these acts, or orders. Let not gentlemen misrepresent us.

Mr. MARTIN. I am happy that the gentleman has disavowed the doctrine: certainly, not only myself and others did so understand him.

Mr. HAY. I disavowed no doctrine: I cannot disavow the doctrine he ascribes to us, because I never did avow it.

Mr. MARTIN. Then, Sir, I will apply, not only to the recollection of the Court, but to the bye-standers, whether it was not correctly stated. Did not the gentleman ask me, where I received my principles of law; and, seemed surprised that I, coming from the State of Maryland, should attempt to enlighten and instruct the Virginia Bar? I came from Maryland, Sir, not to instruct or enlighten the Virginia Bar: I came to add my little talents to those of other gentlemen in favour of my friend; who, I believe, is innocent as a child of the heavy charges made against him. And, Sir, I have clear proof that my instruction would be in vain, or they would not have agreed so directly against their own conviction as they have done. If, however, I might add a mite of instruction or advice, it should be, that the prosecutor would add to his talents a little of the honey of human nature, and submit to the benign principles of the law. I would charge him not to suffer those talents to take a step towards persecution. I would, if I dared to give advice, recommend to him not to be crying out *guilt—guilt*—at every opening which presents. But Sir, as I did not come here to give advice, (and if I had, it would have been thrown away), I shall content myself with the bare declaration—that, I believe, he does not want any of my advice.

I have said, that I believed the orders and the letter to be necessary. I have adduced a few reasons. As to the opposition made to

them, it can come before the Court at a future state of the case, if ever that should arise. I think the Court will see that they are necessary; and, particularly at this time, if they take a review of the arguments; which, I have no doubt, they will. It is upon these, that much depends, relating to the guilt or innocence of our client, provided they should be able to prove such acts of resistance as they say they are confident of proving; but which, we believe, never can be proved, except it be by persons who may come here disregardful of truth, and with a design to throw blame where it ought not to rest Now, what reason have we to know that these papers could be otherwise got, than by applying to the President, since we know all public documents are at his command?

But, there have been two objections made, which I do not recollect any answer was given to. One was, that if these papers come, what is to be done with them? I answer, that if the President comes, he will have them in possession: if he should send them, they will be put into the possession of the Court, until they are wanted. Another related to the day, when the subpœna should be made returnable. Why, Sir, there is no day when this cause is set down to be tried; and how could we name a day, then? The Grand Jury have not yet begun to examine the witnesses: no bill is given into their hands yet. Generally speaking, all process is made returnable to the first day of the session; but, in this particular situation, it can be only at such a time as to admit of a return of the process. The witness will have to attend as soon as possible after the process is served, whenever it is served after the Court is in its session.

Mr. BURR. May it please the Court. So far as the observations and arguments have been adduced by my Counsel, I think the reasoning is conclusive. However, I shall offer a few additional remarks. The Counsel for the prosecution are mistaken, Sir, when they say the subpœna is improperly addressed, when addressed to the President; and, the reasons they give are—because, if it is a public paper, it is deposited among the archives of State. Now, I conceive it to be no such thing, as the departments are totally different; but, if they were not, the President would have the command of them.

Again, Sir. There is no official correspondence between Gen. Wilkinson, as commander in chief of the army, and the President, or Mr. Maddison: all his communications are interchanged with the Secretary at War. There might be, indeed, some intercourse as Governor; but, such occasions cannot often occur. It is customary for officers always to direct to the department where their business lies; and, if any is directed to the President, it never goes into any other office. I may safely apply to the knowledge of the Court for a proof of this. As to this letter, it is impossible for us now to know to whom it was addressed: it was supposed to be addressed to the President; but, this is not yet discovered. However, I have pursued it to the place where I knew it to be last; and,

that was, in the hands of the President, as he testifies in his communication to Congress. But, if it should be lodged with the Secretary of State, he can readily give an order for it to be sent: this is the common course. Then, Sir, suppose we have a right to the papers; he, surely, after receiving the process, must say something: he will say it is not in his power or possession, and say where it is; and that he has given, or will give orders for their transmission to Richmond—or something. He cannot, however, say that they are not within his power.

But, Sir, do gentlemen imagine that there is no proof to be collected, or no ground of inference but what was communicated to Congress? There is a great deal; and, which will be of importance to us. I will state a circumstance which does not appear to have been noticed, or have occurred to my friends; which, I think, will render conviction. It is stated, that a letter writen by Gen. W. and dated the 21st of October, was received on the 25th November; two days after which, the President issued his proclamation, which appears to have been grounded on that letter. He has divulged, I suppose, the principal parts of that letter to Congress; but, what do we see in what he has communicated? Not a word of Treason having been committed, either at New-Orleas or elsewhere. No; but, it is—that Col. Burr was in gun-boats preparing an expedition to attack the Spanish colonies. Now, where is the Treason in this? And, is it probable, that he would have merely given this simple circumstance of the attack upon the Spanish colonies, when something so much more alarming was behind and untold? Impossible! Then, Sir, if there was no other reason, this is a conclusive one, why we should want the letter.

But, Sir, at this moment Gen. W. was in expectation of a contest with the Spanish forces. And, is not this a state of war? Armies facing, and hourly calculating upon a battle, or at least a skirmish. He does not, to be sure, speak of terror; but, he says, it must soon inevitably come to a close. But here we find him at the head of an army of one or two thousand soldiers, mostly volunteers. Could it be supposed he would be afraid of being beaten by the opposing forces? And yet, at this very state, did he agree in convention with the Spaniards, and each retired in peace. Now, is this not another reason why that letter is indispensable?

These orders are stated to be military orders; and, in the communication received, it is evident that they concern me. Indeed, I suppose, that the whole of the correspondence and the orders have a bearing towards me. I have said, that one of these orders was inserted in a Mississippi newspaper—indeed, it was read by several gentlemen in this town, and the language of it was in the style before stated—to attack me, and destroy me and my property. Indeed, I am strengthened in my understanding of the sanguinary nature of these orders, from an interview I had with Mr. Mead, (acting Governor of the Mississippi Territory), who communicated to the Government what he communicated to me personally. I

manifested the most peaceable disposition, and submissive demeanor. He told me that he was justified by the orders he had received, to take me; but, that he was extremely glad he had met with me so easily; because he had, two nights before, sent out a party armed with tomahawks and knives; and, that he had since sent out another party, both of them with orders to take me: neither of which, he was glad, had reached me. He also acknowledged that Capt. Shaw, of the Navy, had orders to the same purport; but, how those orders got into the newspapers, he could not tell. I mentioned this to the Court, because it must all be in the knowledge of the government; and, as an additional reason why we should have a copy of these orders. There cannot now be any excuse to not let us have them; because, the circumstances that were supposed to demand them, are at an end. It is only a right which we could demand in any civil suit in any Court, and has always been customary. There were cases at issue, where naval orders were necessary to be in Court, under the administration of Mr. Adams. There was no dispute about it: they were provided, and the cause of justice was served. Again, Sir, in the case of Sir Home Popham, which has been mentioned, the secret navy-cabinet was searched, and justice administered. And, can there be a possible reason for withholding them now? And, if the attack that was threatened upon me was without orders, I surely ought to know it. I must confess frankly, that I still think the orders did not amount to that attack. I cannot think that the government would put to death 60 or 70 harmless citizens, and destroy their property, whose only object was a settlement on lands. Sir, I want to discover who were the agents of such harsh measures; for, certainly, if there is any fraud in it, as I suspect there is, they ought to suffer. But, it will be seen, that those who attacked me, or were in search of, and surrounding me, were five times the number of those that were with me, and who could have very little hopes of success in resistance.

Mr. HAY wished to know how all things bore upon the question.

Mr. BURR. Sir, if those things were so, was I not justifiable to resist, had I been able? If I did not oppose such machinations, I should little have merited the name of a citizen.

But another object which presents itself, is, that this letter from Gen. Wilkinson has, most probably, matter of a private nature in it; and, therefore, admitting our right to a copy of what respects myself, I have no claim upon the original, because it is private: it might expose measures or names. Now, upon my view of this argument, I do not see it so extremely forcible as those gentlemen. I admit that private confidence ought to be regarded; but, if names are put in that letter, what do they relate to? Why is it demonstrative that they relate to me? All that we can imagine is, that this, that, or the other man says that Aaron Burr has been guilty of treason, or has done such and such things. Now suppose these names were exposed, would there any harm occur? By no means.

This delicacy has not been observed with regard to any of my friends; for, they have been exposed in the most wanton and unfeeling manner.

But, Sir, I am denounced, and that by the highest authority known in this country. I think I have a right to see upon what grounds I am thus denounced. It is not to be wondered at, that such a general prejudice should affect the public, when it flows from so high a source. And, yet, all this is made up of "rumours," and other such slight sources. How can I more effectually remove this impression, than by searching for the source; and this, as far as is in the power of the government to give, is due to me. We want not this paper for purposes of detraction, but to discover facts which are now out of our knowledge. No, Sir, I have no other dependance but these papers to prove my innocence, and of the application of this trial to the rules of law. I ask no other privilege of my fellow-citizens, than the law gives me a right to.

My Counsel have been charged with casting reflections on the measures of the administration, and for dealing too freely with some characters connected with it. Lest it should be suspected that I justified, or instructed them to indulge themselves so far, I would beg leave to explain, that, on the contrary, I am sorry such severe strictures have taken place. Nothing is farther from my wishes; and, I believe, no part of my life will be found, wherein I have so indulged myself. I will appeal to my Counsel themselves, whether I have not certainly charged them to avoid making any inferences that would appear irritating. That we had nothing to do with the administration in our case; but, that with their agents we had to do; and all other characters, we ought to avoid mentioning. If, Sir, my Counsel should be so fortunate as to establish my innocence, the reproach may be found to rest somewhere else. This we shall examine hereafter. The activity of their agency is too apparent to escape notice; as also the vigilance with which my every step is pursued, and the advantages taken of every circumstance to promote my conviction. It is well observed by the able editor of the State trials, that *Courts should be vigilant, in every instance where the State is a party, because of the vast dispoportion between the State and an accused individual.* There ought nothing, then, that is ividious, to be discovered in prosecutions by Government, because of the inequality of the parties.

Mr. Hay says, that he has sent for these papers. Now, Sir, we cannot depend upon the use of them from that source; because, if he should obtain them, it is at his pleasure whether he will grant us the use of them or not. But, if we have the orders of the Court, there can be no doubt of our procuring them. Were they to be sent for privately by us first, and then refused, as we have experienced; no return being made, and the process of the Court being afterwards to be obtained, will cause a delay, (which I wish by all means to avoid) of about 12 days. I therefore trust we shall obtain the motion

Mr. HAY observed, that he had been very much struck with the boldness and temerity of some gentlemen, upon a subject about which they were totally uninformed, and as egregiously mistaken. If I did not misunderstand Mr. Randolph the other day, (and other gentlemen perhaps), he proclaimed aloud, (not to me Sir, he had no cause for that, but) to the people, that there was some parts in the President's order to the Navy Department, which had excited in his mind the most unpleasant sensations. This order was given "for the purpose of seizing and destroying Col. Burr and burning his property, wherever found." It was confidently stated, that this order was most sanguinary and cruel, and so it has been all along represented. Mr. Martin, in his eloquent, but in a most vehement manner, talked about the "blood-hounds being let loose to hunt Mr. Burr down; to catch him in their toils; to destroy him, and treat him as no freeman was ever treated before!" Now, said Mr. Hay, I have suffered this kind of language to go on for a considerable time, and even this morning we have heard a little of it. I am exceedingly sorry that gentlemen should not more value their integrity and character, than to let loose their passions, in misstatements and misrepresentations of an act of the Government; which, not only never was performed, but, which they were incapable of performing. I could not expect to put a stop to this mode of proceeding, in which gentlemen have so extensively indulged themselves, were I not possessed of a copy of the very paper to which all this refers; and which, if the gentlemen will hear me, I will read. It is Mr. Smith's (Secretary of the Navy) copy of the orders given by him. The opposite Counsel pressed to look at the paper. Mr. Hay, refused; he said that he had submitted himself so continually to be dictated to, that he would this time take his own course. But they had been talking so much about cruelty and severity, that he wished now to give the Court to know that there was no such thing in the order; for which he would wish to read, but would not give it to the gentlemen.

Mr. BOTTS rose to answer to the charge made against Mr. Randolph, who was not present. He did not think Mr. Hay intentionally misrepresented any thing; but, it was observable, he presumed, that their principal object was, to have the import of the Presidential orders ascertained. It was incorrect to insinuate, that the Counsel for Mr. Burr had charged any thing which they had not evidence of; and, were all the energies of the Executive brought to bear upon him, it would not make him say one single word less than he was disposed to do, when he had truth and justice on his side. We do not charge the Executive with any wrong, but what we have *prima facia* evidence of; for, we prefer executive innocence and integrity, where it can be made plain; and, we trust, that it will be so cleared up, as to discover to us our mistake upon facts which we now believe. Mr. B. said, that it certainly was

most true as stated by Mr. Burr—that, if one of his Counsel should wander into party reflections, or into executive measures, except where they were palpably connected, he should express his disapprobation of it; for, it was not right, that the time of the Court should be consumed by such indulgencies. We must own our difficulties are great to encounter; that the popular voice is against us; but, we trust, that truth will prevail.

CHIEF JUSTICE. The present motion has taken up more than two days. Gentlemen must perceive that after the argument is gone through, the Court must have the labour to determine the point of law. It is supposed that gentlemen have very frequently gone out of the question, and entirely changed the nature of the controversy. Now, it is apparent, that the Court have been very unwilling to check the argument; and, never would do it, when the subject of the motion or case was in debate; yet, where it does not believe that it is necessary to the justice of the case, its feelings must somewhat suffer to observe the liberties taken. If necessary, the Court will dispense with hearing more than the usual number of gentlemen speak. But, it is recommended, that gentlemen would, on any incidental point, so arrange the course of argument amongst themselves, as not to make repetitions, or consume unnecessary time.

Mr. HAY again proposed to read the copy of the Navy orders. Mr. Martin expressed a doubt, whether this was the indentical order referred to: there may be many.

Mr. E. RANDOLPH wanted to see it, to know whether it was the same as they had seen in the Natchez Gazette. On this Mr. Hay put it up again; declaring that he did believe it to be the same; but, gentlemen did not want it to be read.

SATURDAY, June 13, 1807.

The CHIEF JUSTICE delivered the following OPINION on the motion to issue a subpœna *Duces Tecum*, directed to the President of the United States.

The object of the motion now to be decided, is, to obtain copies of certain orders understood to have been issued to the land and naval officers of the United States, for the apprehension of the accused; and an original letter from Gen. Wilkinson to the President in relation to the accused, with the answer of the President to that letter: which papers are supposed to be material to the defence. As the legal mode of effecting this object, a motion is made for a subpœna *duces tecum*, to be directed to the President of the United States.

In opposition to this motion, a preliminary point has been made by the Counsel for the prosecution. It has been insisted by them, that, until the Grand Jury shall have found a true bill, the party accused is not entitled to subpœnas, or the aid of the Court to obtain his testimony.

It will not be said, that this opinion is now for the first time advanced in the United States; but, certainly, it is now for the first time advanced in Virginia. So far back as my knowledge of our jurisprudence is possessed, the uniform practice of this country has been, to permit any individual who was charged with any crime, to prepare for his defence; and, to obtain the process of the Court, for the purpose of enabling him so to do. This practice is as convenient, and is as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable; which frequently occasion the loss of testimony, and are often oppressive; that would be the inevitable consequense of withholding from a prisoner the process of the Court, until the indictment against him was found by a Grand Jury. The right of an accused person to the process of the Court, to compel the attendance of witnesses, seems to follow necessarily from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. It is not doubted, that a person who appears before a Court, under a recognizance, must expect that a bill will be preferred against him, or that a question concerning the continuance of the recognizance, will be brought before the Court. In the first event, he has the right, and it is perhaps his duty, to prepare for his defence at the trial. In the second event, it will not be denied, that he possesses the right to examine witnesses on the question of continuing his recognizance. In either case, it would seem reasonable that he should be entitled to the process of the Court, to procure the attendance of the witnesses.

The genius and character of our laws and usages, are friendly, not to condemnation at all events, but to a fair and impartial trial; and, they consequently allow to the accused, the right of preparing the means to secure such a trial. The objection that the Attorney may refuse to proceed at this time, and that no day is fixed for the trial, if he should proceed, presents no real difficulty. It would be a very insufficient excuse to a prisoner who had failed to prepare for his trial, to say, that he was not certain the Attorney would proceed against him. Had the indictment been found at the last term, it would have been in some measure uncertain, whether there would have been a trial at this, and still more uncertain at what day the trial would have taken place: yet subpœnas would have issued, returnable to the first day of the term; and if, after its commencement, other subpoenas had been required, they would have issued returnable as the Court might direct. In fact, all process to which the law has affixed no certain return-day, is made returnable at the discretion of the Court.

General principles then, and general practice, are in favor of the right of every accused person, so soon as his case is in Court, to prepare for his defence, and to receive the aid of the process of the Court to compel the attendance of his witnesses.

The constitution and laws of the United States, will now be con-

sidered for the purpose of ascertaining how they bear upon the question.

The 8th amendment to the Constitution, gives to the accused, in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor. The right given by this article, must be deemed sacred by the Courts; and, the article should be so construed, as to be something more than a dead letter. What can more effectually elude the right to a speedy trial, than the declaration, that the accused shall be disabled from preparing for it, until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into Court.

This observation derives additional force, from a consideration of the manner in which this subject has been contemplated by Congres. It is obviously the intention of the National Legislature, that in all capital cases, the accused shall be entitled to process, before the indictment be found. The words of the law are—"And every such person or persons accused or indicted of the crimes aforesaid, (that is, of Treason, or any other capital offence), shall be allowed and admitted in his said defence, to make any proof that he or they can produce, by lawful witness or witnesses; and, shall have the like process of the Court, where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them."

This provision is made for persons accused or indicted. From the imperfection of human language, it frequently happens, that sentences which ought to be explicit, are of doubtful construction; and in this case the words "accused or indicted" may be construed to be synonimous, to describe a person in the same situation, or to apply to different stages of the prosecution. The word *or* may be taken in a conjunctive or a disjunctive sense. A reason for understanding them in the latter sense, is furnished by the section itself. It commenced with declaring that any person who shall be accused *and* indicted of treason, shall have a copy of the indictment, and at least three days before his trial. This right is obviously to be enjoyed after an indictment, and therefore the words are "accused *and* indicted." So with respect to the subsequent clause which authorises a party to make his defence, and direct the Court on his application to assign him Counsel. The words relate to any person accused *and* indicted. But when the section proceeds to authorise the compulsory process for witnesses, the phraseology is changed. The words are—"and every such person or persons accused *or* indicted," &c. thereby adopting the expression to the situation of an accused person, both before and after indictment. It is to be remarked too, that the person so accused *or* indicted, is to have "the like process to compel his or their witnesses to appear

at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them." The fair construction of this clause would seem to be, that with respect to the means of compelling the attendance of witnesses to be furnished by the Court, the prosecution and defence are placed by the law on equal ground. The right of the prosecutor to take out subpoenas, or to avail himself of the aid of the Court in any stage of the proceedings previous to the indictment, is not controverted. This act of Congress, it is true, applies only to capital cases; but persons charged with offences not capital, have constitutional and a legal right to examine their testimony; and this act ought to be considered as declaratory of the common law in cases where this constitutional right exists.

Upon immemorial usage then, and upon what is deemed a sound construction of the constitution and law of the land, the Court is of opinion, that any person charged with a crime in the Courts of the United States has a right before, as well as after indictment, to the process of the Court, to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction: no mischief which is perceived can be produced by it. The process would only issue, when according to the ordinary course of proceeding, the indictment would be tried at the term to which the subpoena is made returnable, so that it becomes incumbent on the accused to be ready for his trial at that term.

This point being disposed of, it remains to enquire whether a subpoena *duces tecum* can be directed to the President of the United States, and whether it ought to be directed in this case.

This question originally consisted of two parts. It was at first doubted whether a subpoena could issue in any case to the Chief Magistrate of the nation; and if it could, whether that subpoena could do more than direct his personal attendance; whether it could direct him to bring with him a paper which was to constitute the substance of his testimony.

While the argument was opening, the Attorney of the United States avowed his opinion, that a general subpoena might issue to the President, but not a subpoena *duces tecum*. This terminated the argument on that part of the question. The Court, however, has thought it necessary to state briefly, the foundation of its opinion, that such a subpoena may issue.

In the provisions of the Constitution and of the statute which give to the accused a right to the compulsory process of the Court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them but one who would not be a witness. At any rate, if an exception to the general principle exists, it must be looked for in the law of evidence. The exceptions furnished by the law of evidence (with one only reservation) so far as they are personal, are of those only whose testimony could not be received. The single reservation alluded to is the case of the King. Although he may perhaps give testimony, it is said to be incompatible with his

dignity to appear under the process of the Court. Of the many points of difference which exist between the First Magistrate in England and the First Magistrate of the United States, in respect of the personal dignity conferred on them by the constitution of their respective nations, the Court will only select and mention two. It is a principle of the English constitution, that the King can do no wrong—that no blame can be imputed to him—that he cannot be named in debate.

By the constitution of the United States, the President, as well as every other officer of the Government, may be impeached, and may be removed from office on conviction of high crimes and misdemeanors.

By the constitution of Great Britain, the crown is hereditary, and the monarch can never become a subject.

By that of the United States, the President is elected from the mass of the people; and on the expiration of the term for which he is elected, returns to the mass of the people again.

How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the Executive Chief, will be perceived by every person. In this respect, the First Magistrate of the Union may more properly be likened to the First Magistrate of a State—at any rate under the former confederation; and it is not known ever to have been doubted, that the Chief Magistrate of a State might be served with a subpoena *ad testificandum.*

If in any Court of the United States, it has ever been decided, that a subpoena cannot issue to the President, that decision is unknown to this Court.

If upon any principle, the President could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as Chief Magistrate demand his whole time for national objects. But it is apparant, that this demand is not unremitting; and if it should exist at the time when his attendance on a Court is required, it would be shown on the return of the subpoena; and would rather constitute a reason for not obeying the process of the Court, than a reason against its being issued. In point of fact, it cannot be doubted, that the people of England have the same interest in the service of the executive government, (that is, of the cabinet council,) that the American people have in the service of the executive of the United States, and that their duties are as arduous and as unremitting. Yet it has never been alledged, that a subpoena might not be directed to them.

It cannot be denied, that to issue a subpoena to a person filling the exalted station of the Chief Magistrate, is a duty which would be dispensed with much more cheerfully, than it would be performed; but if it be a duty, the Court can have no choice in the case.

If then, as is admitted by the Counsel for the United States, a subpœna may issue to the President, the accused is entitled to it of course; and whatever difference may exist with respect to the

power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard furnished to this high officer to protect him from being harrassed by vexatious and unnecessary subpœnas, is to be looked for in the conduct of a Court after those subpœnas have issued, not in any circumstance which is to precede their being issued.

If in being summoned to give his personal attendance to testify, the law does not discriminate between the President and a private citizen, what foundation is there for the opinion, that this difference is created by the circumstance that his testimony depends on a paper in his possession, not on facts which have come to his knowledge otherwise than by writing? The Court can perceive no foundation for such an opinion. The propriety of introducing any paper into a case as testimony, must depend on the character of the paper, not on the person who holds it. A subpœna *duces tecum* then may issue to any person to whom an ordinary subpœna may issue, directing him to bring any paper of which the party praying it has a right to avail himself, as testimony, if indeed that be the necessary process for obtaining the view of such paper. When this subject was suddenly introduced, the Court felt some doubt concerning the propriety of directing a subpœna to the Chief Magistrate; and some doubt also concerning the propriety of directing any paper in his possession, not public in its nature, to be exhibited to the Court. The impresson, that the question which might arise in consequence of such process, were more proper for discussion on its issuing, was then strong in the minds of the Judges; but the circumspection with which they would take any step, which would in any manner relate to that high personage, prevented their yielding readily to those impressions; and induced the request that those points, if not admitted, might be argued. The result of that argument is a confirmation of the impression originally entertained. The Court can perceive no legal objection to issuing a subpœna *duces tecum*, to any person whatever, provided, the case be such as to justify the process.

This is said to be a motion to the discretion of the Court. This is true. But a motion to its discretion, is a motion not to its inclination, but its judgement; and its judgement is to be guided by sound legal principles.

A subpœna *duces tecum*, varies from an ordinary subpœna only in this—that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister States whose system of jurisprudence is erected on the same foundation with our own, this process, we learn, issues of course. In this State it issues not absolutely of course, but with leave of the Court. No case, however, exists, as is believed, in which the motion has been founded on an affidavit, in which it has been opposed. It has been truly observed, that the opposite party can regularly take no more interest in the awarding a subpœna *duces tecum*, than in the

awarding an ordinary subpoena. In either case he may object to any delay, the grant of which may be implied in granting the subpoena; but he can no more object regularly to the legal means of obtaining testimony, which exists in the mind, than in the papers of the person who may be summoned. If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an *amicus curta*, to prevent the Court from making an improper order, or from burdening some officer by compelling an unnecessary attendance. This Court would certainly be very unwilling to say, that upon fair construction, the constitutional and legal right to obtain its process to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence. The literal distinction which exists between the cases, is too much attenuated to be countenanced in the tribunals of a just and humane nation. If then, the subpoena be used without enquiry into the manner of its application, it would seem to bear on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence, within narrower limits that is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right, to apply for papers deemed by himself to be material. In the one case, the accused is made the absolute judge of the testimony to be summoned; if in the other, he is not to judge absolutely for himself; his judgment ought to be controled only so far as it is apparent that he means to exercise his privileges, not really in his own defence, but for purposes which the Court ought to discountenance. The Court would not lend its aid to motions obviously designed to manifest disrespect to the Government; but the Court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence.

There observations are made, to show the nature of the discretion which may be exercised. If it is apparent that the papers are irrelative to the case; or, that for State reasons, they cannot be introduced into the defence, the subpœna *duces tecum* would be useless: but, this is not apparent. If they may be important in the evidence—if they may be safely read at the trial—would it not be a blot in the page which records the judicial proceedings of this country, that, in a case of such serious import as this, the accused should be denied the use of them?

The Counsel for the United States take a very different view of this subject, and insist, that a motion for a process to obtain testimony, should be supported by the same full and explicit proof of the nature and application of their testimony, which would be required on a motion which would delay public justice; which would arrest the ordinary course of proceeding, or which would in any other manner affect the rights of the opposite party. In favor of this position, has been urged the opinion of one, whose loss as a friend and as a Judge, I sincerely deplore; whose worth I feel,

and whose authority I shall at all times greatly respect. If his opinion was really opposed to mine, I should certainly revise, deliberately revise the judgment I had formed.—But, I perceive no such opposition.

In the trials of Smith and Ogden, the Court in which Judge Patterson presided, required a special affidavit in support of a motion made by the Counsel for the accused for a continuance, and for an attachment against witnesses who had been summoned, and had failed to attend.

Had this requisition of a special affidavit been made as well a foundation for an attachment as for a continuance, the cases would not have been parallel; because the attachment was considered, by the Counsel for the prosecution, merely as a mean of punishing the contempt; and a Court might certainly require stronger testimony to induce them to punish a contempt, than would be required to lend its aid to a party, in order to procure evidence in a case. But the proof furnished by the case is most conclusive, that the special statements of the affidavit were required solely on account of the continuance.

Although the Counsel for the United States considered the motion for an attachment merely as a mode of punishing for contempt, the Counsel for Smith and Ogden considered it as compulsory process to bring in a witness, and moved a continuance until they could have the benefit of this process. The continuance was to arrest the ordinary course of justice, and therefore the Court required a special affidavit, shewing the materiality of the testimony before this continuance could be granted. *Prima facia* evidence could not apply to the case, and there was an additional reason for a special affidavit. The object of this special statement was expressly said to be for a continuance.

Colden proceeded.—"The present application is to put off the cause, on account of the absence of witnesses, whose testimony the defendant alledges is material for his defence, and who have disobeyed the ordinary process of the Court. In compliance with the intimation from the Bench yesterday, the defendant has disclosed, by the affidavit which I have just read, the points to which he expects the witnesses who have been summoned will testify.

"If the Court cannot, or will not issue compulsory process to bring in the witnesses who are the objects of this application, then the cause will not be postponed.

"Or if it appears to the Court, that the matter disclosed by the affidavit might not be given in evidence if the witnesses were now here, then we cannot expect that our motion will be successful.—For it would be absurd to suppose, that the Court will postpone the trial on account of the absence of witnesses, whom they cannot compel to appear, and of whose voluntary attendance there is too much reason to despair; or, on account of the absence of witnesses, who if they were before the Court, could not be heard on the trial."——(Page 12.)

This argument states unequivocally the purpose for which a special affidavit was required.

The Counsel for the United States considered the subject in the same light. After exhibiting an affidavit for the purpose of shewing that the witnesses could not probably possess any material information, Mr. Sandford said "it was decided by the Court yesterday, that it was incumbent on the defendant, in order to entitle him to a postponement of the trial on account of the absence of these witnesses, to shew in what respect they are material for his defence. It was the opinion of the Court, that the general affidavit in common form, would not be sufficient for this purpose; but, that the particular facts expected from the witnesses must be disclosed, in order that the Court might, upon those facts, judge of the propriety of granting a postponement." (Page 27.)

The Court frequently treated the subject, so as to shew the opinion, that the special affidavit was required only on account of the continuance; but, what is conclusive on this point, is, that after deciding the testimony of the witnesses to be such as could not be offered to the Jury, Judge Patterson was of opinion, that a rule to shew cause why an attachment should not issue, ought to be granted. He could not have required the materiality of the witness to be shewn on a motion, the success of which, did not, in his opinion, in any degree depend on that materiality; and which he granted, after deciding the testimony to be such as the Jury ought not to hear. It is then most apparent, that the opinion of Judge Patterson has been misunderstood, and that no inference can possibly be drawn from it, opposed to the principle which has been laid down by the Court. That principle will therefore be applied to the present motion.

The first paper required, is the letter of Gen. Wilkinson, which was referred to in the message of the President to Congress. The application of that letter to the case, is shewn by the terms in which the communication was made. It is a statement of the conduct of the accused, made by the person who is declared to be the essential witness against him. The order for producing this letter is opposed.

1st—Because it is not material to the defence.

It is a principle universally acknowledged, that a party has a right to oppose to the testimony of any witness against him, the declarations which that witness has made at other times on the same subject. If he possesses this right, he must bring forward proof of those declarations. This proof must be obtained, before he knows positively what the witness will say; for, if he waits until the witness has been heard at the trial, it is too late to meet him with his former declarations. Those former declarations, therefore, constitute a mass of testimony which a party has a right to obtain by way of precaution; and, the positive necessity of which, can only be decided at the trial.

It is with some surprise an argument was heard from the Bar,

insinuating that the award of a subpœna on this ground, gave the countenance of the Court to suspicions, affecting the veracity of a witness who is to appear on the part of the United States. This observation could not have been considered. In contests of this description, the Court takes no part: the Court has no right to take a part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor, if in this case the accused should produce a witness completely exculpating himself, and the Attorney of the United States should be arrested in his attempt to prove what the same witness had said upon a former occasion, by a declaration from the Bench, that such an attempt could not be permitted, because it would imply a suspicion of Court, that the witness had not spoken the truth? Respecting so unjustifiable an interposition, but one opinion would be formed.

The 2d objection is, that the letter contains matter which ought not to be disclosed.

That there may be matter, the production of which the Court would not require, is certain; but that in a capital case, the accused ought not, in some form, to have the benefit of it, if it was really essential to his defence, is a position which the Court would very reluctantly deny. It ought not to be believed, that the department which superintends prosecutions in criminal cases, would be inclined to withhold it. What ought to be done under such circumstances, present a delicate question; the discussion of which, it is hoped, will never be rendered necessary in this country. At present, it need only be said, that the question does not occur at this time. There is certainly nothing before the Court, which shews, that the letter in question contains any matter, the disclosure of which, would endanger the public safety. If it does contain any matter which it would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed. It is not easy to conceive, that so much of the letter as relates to the conduct of the accused, can be a subject of delicacy with the President. Every thing of this kind, however, will have its due consideration on the return of the subpœna.

3dly. It has been alledged, that a copy may be received instead of the original; and, the act of Congress has been cited in support of this proposition.

This argument pre-supposes, that the letter required, is a document filed in the Department of State; the reverse of which may be, and most probably is the fact. Letters addressed to the President, are most usually retained by himself: they do not belong to any of the Departments. But, were the fact otherwise, a copy might not answer the purpose. The copy would not be superior to the original; and the original itself would not be admitted, if denied, without proof that it was the hand-writing of the witness. Suppose the case put at the Bar, of an indictment on this letter for

a libel, and on its production, it should appear not to be the hand-writing of the person indicted—Would its being deposited in the Department of State, make it his hand-writing, or subject him to the consequence of having written it? Certainly not. For the purpose, then, of shewing the letter to have been written by a particular person, the original must be produced, and a copy could not be admitted.

On the confidential nature of this letter, much has been said at the Bar; and, authorities have been produced, which appear to be conclusive. Had its contents been orally communicated, the person to whom the communications were made, could not have excused himself from detailing them so far as they might be deemed essential in the defence. Their being in writing, gives no additional sanctity: the only difference produced by that circumstance is, that the contents of the paper must be proved by the paper itself, not by the recollection of the witness.

Much has been said about the disrespect to the Chief Magistrate which is implied by this motion, and by such a decision of it as the law is believed to require.

These observations will be very truly answered by the declaration, that this Court feels many, perhaps peculiar motives, for manifesting as guarded a respect for the Chief Magistrate of the Union, as is compatible with its official duties. To go beyond these, would exhibit a conduct which would deserve some other appellation than the term respect.

It is not for the Court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it, should certainly regret that a paper which the accused believed to be essential to this defence; which may, for aught that now appears, be essential, had been withheld from him. I will not say that this circumstance would in any degree tarnish the reputation of the government; but, I will say, that it would justly tarnish the reputation of the Court which had given its sanction to its being withheld. Might I be permitted to utter one sentiment with respect to myself, it would be, to deplore most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him.

The propriety of requiring the answer to this letter, is more questionable. It is alledged, that it most probably communicates orders shewing the situation of this country with Spain, which will be important on the misdemeanor. If it contains matter not essential to the defence, and the disclosure is unpleasant to the Executive, it certainly ought not to be disclosed. This is a point which will appear on the return.

The demand of the orders which have been issued, and which have been as is alledged, published in the Natchez Gazette, is by

no means unusual. Such documents have often been produced in the Courts of the United States, and the Courts of England. If they contain matter interesting to the nation, the concealment of which is required by the public safety, that matter will appear on the return. If they do not, and are material, they may be exhibited.

It is said, they cannot be material, because they cannot justify any unlawful resistance which may have been employed, or meditated by the accused.

Were this admitted, and were it also admitted that such resistance would amount to treason, the orders might still be material, because they might tend to weaken the endeavor to connect such overt act, with any overt act, of which this Court may take cognizance.

The Court, however, is rather inclined to the opinion, that the subpœna in such case ought to be directed to the head of the department in whose custody the orders are. The Court must suppose, that the letter of the Secretary of the Navy which has been stated by the Attorney for the United States, to refer the Counsel for the prisoner to his legal remedy for the copies he desired, alluded to such a motion as is now made.

The affidavit on which the motion is grounded, has not been noticed. It is believed, that such a subpœna as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material, and ought to be admitted. It is only because the subpoena is addressed to those who administer the Government of this country, that such an affidavit was required, as would furnish probable cause to believe that the testimony was desired for the real purpose of defence, and not for such as this Court will forever discountenance.

When the Chief Justice had concluded his opinion, Mr. M'Rae addressed the Court to the following effect:

I hope, Sir, that I have misunderstood an expression, which has just fallen from your Honor; but the opinions of those gentlemen, who are near me, completely confirm my own conceptions. Your Honor has declared, if I mistake not, that "if the present prosecution terminates as is wished, on the part of the United States." I hope, Sir, that nothing has appeared in my conduct, nothing in the conduct of the gentlemen who are associated with me on the present occasion, and nothing in the conduct of the Government, to produce such a conviction in the breast of the Court. Permit me, Sir, to assure this Court, if we feel any sentiment at all, that it is one of a very different discription. The impression which has been thus conveyed by the Court, that we not only wished to have A. Burr accused, but that we wished to convict him, is completely abhorrent to our feelings. We trust that it has rather accidentally fallen from the pen of your Honor, than that it is your deliberate opinion. We wish for nothing, Sir, but a fair and competent in-

vestigation of this case. It is far from our wishes, that A. Burr should be convicted but upon the most satisfactory evidence. And let me assure this Court, that nothing would more severely wound my feelings, than if you, or if any other man should suppose it possible that I myself, or the gentlemen with whom I am associated, or the Government which we have the honor to represent, should at all events desire the conviction of the prisoner.

The CHIEF JUSTICE replied, that it was not his intention to insinuate that the Atornies for the prosecution, or that the administration, had ever wished the conviction of Col. Burr whether he was guilty or innocent; that his assertion was this; gentleman had so often and so uniformly asserted that Col. Burr was guilty; and, they had so often repeated it, before the testimony was perceived on which that guilt could alone be substaniated, that it appeared to him probable, that they were not indifferent on the subject.

Mr. M'RAE begged leave to point out to the Court a considerable difference between the opinions and wishes of the Counsel for the prosecution: that from the testimony which they had examined, they thought it extremely probable that A. Burr was really guilty; but that this was very different from wishing to find him guilty, or to convict him at all events.

Mr. HAY observed, that his own conscience was satisfied with the course which he had pursued in this business; that he should attempt to secure the same sentiment by his future deportment; and provided he enjoyed that satisfaction, he was completely indifferent to the opinion of others: and he should certainly pursue his own judgement.

At the close of the Court, the CHIEF JUSTICE observed, that he had explained the sense in which the words, which had been remarked on by Mr. M'Rae, had been employed; but, that he had no desire that they should remain in the written opinion. That he did not perceive that they were calculated to excite any feeling; but, as it was not his intention to convey the idea, that a conviction right or wrong was wished; and, as that idea had been inferred, and might be thereafter attached to them by those who might see the opinion without hearing the explanatory words, he had expunged them. Accordingly, the words "was wished, &c." were expunged.

Mr. BURR addressed the Court. He observed, that this was, perhaps, the most proper time for renewing the motion, which he had some time ago made to the Court, about giving more special instructions to the Grand Jury on certain points of evidence. These points he had reduced to writing in the form of abstract propositions, which he would take the liberty of reading to the Court.

The following is a list of those propositions, with the authorities cited to support them.

1. The Grand Jury cannot, consistently with their oath, find a Bill, except on such testimony as would justify a Petit Jury to find the prisoner guilty.

Foster 232, sec. 8, 3d Institute 25.—2d Institute 334.—Dalton 519.—Judge Wilson's Works, vol. 2d, 364.—T. W. Williams' Justice, 3d vol. printed 1794.—3d State Trials 419, 420; and Sir John Hawle's Observations, 4 S. T. 133.—4th Blacktone 302 to 306.—2d Hale, c. 8, p. 61.—Wilson's edition, with Wilson's note.—2d Hale, c. 22, p. 157, with Wilson's note.—2d Hale, c. 22, with Wilson's note.—Eunomos Dict. 2d, sec. 39, p. 124-5-6.—S. T. p. 3.—Foster, p. 232, sec. 8.

2. That no testimony or witnesses ought to go to the Grand Jury but what are legal and competent to support the charge about which the enquiry is made.

Danby's case, Leach 443, c. 187.—Dodd's case, Leach 59, c. 77.—Commonwealth of Virginia *vs.* Hopbam, Warles and Daws before the G. Court at Williamsburg.

3. The Grand Jury cannot return a Bill for Treason for levying war against the United States, unless they have two witnesses to swear to the overt act of the Treason laid in the indictment: both which witnesses are believed by them.

East's crown law, c. 2, sec. 64.

That both must be believed, 3d S. T. p. 59.

4. That there must be two witnesses to the Grand Jury of each overt act, follows also as a consequence from the former position, that they must have such testimony as would be requisite for the Petit Jury.

5. That the Grand Jury cannot find a Bill for Treason in consequence of any confessions made, though proved by two witnesses.

Foster 241-3.—4 Black.

Constitution of the U. S. art. 3, sec. 3.—Graydon's Digest 11.—Judge Iredell's charge.—Fries's trial, 171-172.

6. That as the Grand Jury only hear evidence on the part of the State, if upon that evidence they entertain a doubt of the truth of the charge, they ought not to find the Bill, as the presumption is ever in favor of innocence.

1st M'Nally, 2 to 6.

7. No act of a third person can be given in evidence against the accused, to prove him guilty of Treason, or of a Misdemeanor, under the law of the 5th June, 1794—unless that act is proved to have been committed by the advice, command, direction, or instigation of the accused, (if done in his absence, or if done in his presence), unless it be proved that the accused was aiding or assisting.

An act shall bind a person connected with the act; but, the declaration shall not bind him, because it is no part of the act.

M'Nally, 615 to 616.

8. The declarations of others cannot be given in evidence on the present enquiry to support the charge of Treason or of a Misdemeanor, under the act of Congress, 15th June, 1794, unless it be proved that the accused was present, and assented thereto.

East 96—in case of conspiracy, confessions are good against him who makes them, but not against others. Poake B confess, Peake 7 hearsay,—Kelyng 18th, M'Nally 40–41, confessions of one cannot be read against others.

3d State Trial, 57.

A relation of what had been done, no evidence.

M'Nally, 616.

Declarations of others, is not evidence.

4 State Trial, 192–196.

6 State Trials 218 in the presence of others, they acquiescing.

M'Nally, 621.

Mr. HAY opposed this proceeding. He contended, that the Court had no right to give specific instructions to the Grand Jury, after they had been once generally charged by the Court; that such a course was contrary to all law and all precedent; that not a single instance could be quoted to support it; and, that there were cogent, and in this instance, particular reasons why criminal prosecutions should be suffered to progress without these interruptions. He further contended, that the Chief Justice had anticipated such a situation; and, that the language in his charge, clearly indicated his expectation that Bills would be laid before the Grand Jury on the ground of Treason; and, that under this expectation, the Chief Justice had dilated on the nature of Treason, and given all the information which he thought material.—That there was no reason at all, why A. Burr should enjoy greater privileges than any other man; why he should rake up all the old, musty, and absurd doctrines of antiquity, and have them enlisted in his service; and that he stood on the very same ground as any other man.—That perhaps all the propositions on Mr. Burr's list, would not be wanting at all; or, if there should be any necessity for them, that these questions might be discussed as they successively arose.—That these discussions would necessarily consume much of his own time, as well as the time of the Court, which might probably be devoted to more useful purposes: and, after all, the Grand Jury might refuse to hear any instructions; and, in that case, how could they be controuled by the Court? If the Grand Jury determined to pay no regard to it, of what avail would be the recommendation of the Court (for it was in fact no more)? And, if they were to find, according to their own opinions, and in the old way, how could the Court know of this variation? And how could they rectify it?

Mr. BOTTS replied. He stated, that the gentleman had demanded precedents; and yet it was but the other day when that very gentleman had enquired, why we so constantly resorted to precedents; and why we did not sometimes consult the principles of common sense? that the Grand Jury, were not that lawless mob, which the gentleman had seemed to represent them; and, that they would not certainly act against the law, when it was properly expounded to them, by the head of the Court; that although the

Chief Justice's charge was extremely able, yet it was impossible that it could be so comprehensive as it might now be made, from the information which has since occurred; and, that the very necessity of giving any charge at all, shewed the propriety of perfecting it; that it was not col. Burr's desire to consume much time, as it was his most earnest wish to end at once the bonds of recognizance, and the public prejudice, which surrounded him; and, that they were even willing to limit their share of the discussion to a particular time.

The CHIEF JUSTICE said, that it was usual, and the best course for the Court, to charge the Jury generally at the commencement of the term, and to give their opinion on incidental points as they arose, when the Grand Jury themselves should apply to them for information—That it was manifestly improper to commit the opinion of the Court on points, which might come before them to be decided on the trial in chief—That he had generally confined his charges to a few general points, without launching into many details: one reason was, that some of the detailed points might never arise during the session of the Grand Jury; and, any instruction on them, would, of course, be unnecessary.—Another was, that some of these points might be extremely difficult to be decided, and would require an argument of Counsel; because, there was no Judge or man, who would not often find the solitary meditations of his closet very much assisted by the discussions of others—That he would have had no difficulty, however, in expanding his charge, if he had been particularly requested to do it, or if he could have anticipated any necessity for it; and, that he would have no objection in giving his opinion, at this time, on certain points, on which he could obtain discussion by the Counsel; provided, he did not thereby commit his opinion on the trial in chief.

Mr. BURR wished the Court to examine the authorities which he had submitted to their attention; and, if they should find any additional ones necessary, they might be resorted to: which, perhaps, would save much discussion.

Mr. MARTIN contended for the necessity of the Court giving to the Grand Jury, their ideas of what was legal evidence in a case of such magnitude.

The COURT said, that they were ready to hear any discussion on the subject, if it should be supposed necessary; or, examine any points of law that might be submitted.

Mr. HAY insisted that the whole proceeding was without precedent. He was solicitious to avoid the argument, because it would entirely be a waste of time. He must, however, confess his ignorance in criminal law, compared with Mr. Martin.

Mr. BOTTS mentioned a case that occurred at Fredericksburgh; where, after the Grand Jury had retired from the Court, an additional charge was sent up.

Judge MARSHAL said, the Court would not hesitate to give an

additional charge, if any omission had been made in the original one; but, it could be agreed to only in that view.

Mr. BURR thought it proper to mention, that his Counsel had understood, that a supplemental charge had been written by the Court; that it had been put into the hands of the Attorney of the United States; and, that it was to be shewn to his own Counsel before it was delivered. From the want of time, however, or from some other cause, it had not yet been submitted to his own Counsel. The Court had yesterday requested a copy of his propositions, that they might judge of their application; and, if satisfied on that point, that they might give additional instructions to the Jury. His Counsel had complied with this request; and, though it was not possible for the Court at first to have perceived whether a supplemental charge was necessary, yet it had now appeared from the whole course of the argument, that each of his propositions would come before the Grand Jury. If the Court was satisfied on the law, they would of a certainty instruct the Jury on such points as seemed inevitably to come before them.—But, if they had any doubts on the law, they would certainly require an argument; and, that he was then ready to demonstrate the truth of each of the propositions which he had submitted. He should make no remarks on the consumption of time, of which the gentleman made so many complaints: he should only observe, that three weeks ago he was ready to argue these points. But, he was unwilling to limit the time to be employed upon the present argument, to a certain number of minutes. He was willing to argue the points in the way of notes submitted to the Court.

The CHIEF JUSTICE stated, that he had drawn up a supplemental charge, which he had submitted to the Attorney for the United States, with a request that it should be put into the hands of Mr. Burr's Counsel; that Mr. Hay had, however, informed him, in the conversation which he had just had with him, that he had been too much occupied himself, to inspect the charge with attention, and deliver it to the opposite Counsel: but, another reason was, that there was one point in the charge which he did not fully approve. He should not, therefore, deliver his charge at present; but, should reserve it until Monday. In the mean time, col. B's Counsel would have an opportunity of inspecting it; and, an argument might be held on the points which had produced an objection from the Attorney for the United States.

Mr. E. RANDOLPH. Is it the wish of the Court, that the argument should be carried on orally, or in writing?

CHIEF JUSTICE. I am willing to hear the remarks on both sides in writing.

Mr. HAY objected to this method, from the excessive labour which it would impose upon them either way.

The CHIEF JUSTICE declared that it was perfectly indifferent to him

Mr. MARTIN assured the Court, that it was perfectly convenient to him, to argue the point either orally, or in writing.

Mr. WICKHAM stated, that the Attorney for the United States wished to object to certain propositions which col. Burr had submitted to the Court; that he was ready to go into this discussion immediately; that the Attorney of the U. S. preferred an argument orally before the Court to one in writing; and, that this was in fact, the very course which col. B's Counsel had first recommended. Mr. W. hoped, that this supplemental charge would be given to the Jury, before the witnesses were sent up; that the Counsel for the prosecution preferred the contrary, but certainly the most improper course.

The CHIEF JUSTICE observed, that the Court would also have wished that the charge should have been delivered before the witnesses were sent up; but, that it was almost indifferent to him, whether the testimony was submitted to the Grand Jury before or after the delivery of the charge; that it was often the custom for the Petit Jury itself to hear the testimony before the law was expounded; and, the same practice might extend to the Grand Jury; for, it was extremely easy for them, after they had heard the testimony, to apply the instructions of the Court, and distinguish those parts which were admissible, from those which were not so. It was not, for instance, absolutely necessary for them to know, previous to the delivery of the charge, that two witnesses were necessary to prove the overt act, even before a Grand Jury. When the charge had been delivered, that principle would apply to the testimony, which they had actually heard; and, though it was desirable that the charge should precede the testimony, yet it was not so essential as to interrupt the proceedings.

Mr. E. RANDOLPH conceived it far more important to give the supplemental charge before, than after the explanation of the testimony; that, with one set of principles on their mind, the Grand Jury would frequently ask questions in one point of view, which they would not under other impressions; and, that the supplemental, like the original charge, ought to precede the evidence.

Mr. MARTIN observed, that there was this considerable difference between a Grand Jury and a Petit Jury: that when any doubts arose about the propriety of testimony before the Petit Jury, the Court would be present, and ready to decide; but, the Grand Jury has not the same aid of the judgment of the Court in selecting the testimony.

The CHIEF JUSTICE said, that the necessity of giving a supplemental charge at this time, was not so manifest; as, in his original charge, he had expressed his ideas on the nature of Treason—That he stated this crime to consist in an actual "levying of war;" and, that of course, the Grand Jury would have to enquire into the existence of overt acts—That from this statement, it would readily occur to the Jury, that no matter what suspicions were entertained, what plans had been formed, what enterprizes had been projected,

there could be no Treason without an overt act; and, that without some overt act, no crime of Treason had been committed.

Mr. BURR then observed, that it would be of considerable benefit in instructing the Jury to separate what was proper in the evidence from what was improper: that if the charge was not delivered for several days, the Jury might in the mean time be receiving very false impressions; and that their mind might be so completely involved in these impressions, that it would be impossible for them to separate them from their decisions, even after the delivery of the charge. He conceived that the Court ought either to prevent the witnesses from going to the Grand Jury, or to deliver its supplemental charge.

The CHIEF JUSTICE replied, that on Monday morning he would deliver the charge, if all the necessary preliminary points could be settled.

Mr. BOTTS observed, that there was one point in the supplemental charge, which he wished to notice. In one part of the charge, the clause of the Constitution relative to Treason, is quoted; which clause recognizes the necessity of two witnesses to prove an overt act. In a subsequent part, there seems to be an implication that one witness to an overt act is sufficient. How was this contrariety to be explained?

CHIEF JUSTICE. Though the Constitution declares that two witnesses are necessary to produce conviction; yet, it may not be so strictly and absolutely necessary to authorise an indictment. My present impression is, that though there must be two witnesses to the general charge of Treason; yet, that one witness may be sufficient for one act, and another to another. The C. J. quoted the statute of Ed. VI. The law-books made this discrimination between a trial and an indictment.

Mr. HAY. There is one important quesion worthy of our consideration. In your supplemental charge, Sir, you have referred to the statute of Edward VI. But no such statute is now in force here. A general law of the Virginia Legislature, swept off all the British laws; and, then they set to re-enacting such as were congenial with our form of government. But this statute was certainly in force at the commencement of our revolution; and the question is, whether, if *it* was in force *then*, it can be so considered *now*. Do gentlemen contend, that we are bound by a statute, which the government has not adopted?

Erick Bollman appeared—when Mr. HAY addressed the Court to the following effect:

Before Mr. Bollman is sworn, I must inform the Court of a particular, and not immaterial circumstance. He, Sir, has made a full communication to the Government, of the plans, the designs, and views of A. Burr. As these communications might criminate Dr. Bollman before the Grand Jury, the President of the United States has communicated to me this pardon, (holding it in his hand) which I have already offered to Dr. B. He received it in a very

hesitating manner; and, I think informed me, that he knew not whether he should, or should not accept it. He took it from me, however, as he informed me, for the purpose of taking the advice of Counsel. He returned it in the same hesitating manner: he would neither positively accept, nor refuse it. My own opinion is, that Dr. B. cannot, under these circumstances, possibly criminate himself. This pardon will completely exonerate him from all the penalties of the law. I believe his evidence to be extremely material. In the presence of this Court, I offer this pardon to him; and, if he refuses, I shall deposit it with the Clerk for his use. Will you, Sir, (addressing himself to Mr. Bollman) accept this pardon?

Mr. BOLLMAN. No, I will not, Sir.

Mr. HAY then observed, that Dr. Bollman must be carried up to the Grand Jury, with an intimation, that he had been pardoned.

Mr. MARTIN. It has always been Dr. B's intention to refuse this pardon; but he has not positively refused it before. He wished to have this opportunity of publicly rejecting it. He did not suppose that this pardon was a real or effectual one, if he made any confessions before the Grand Jury. They might find an indictment, which would hold against him: nor could his be an effectual one, before it was pleaded to an indictment in open Court.

Mr. HAY enquired, whether Dr. B. might not pass on to the Grand Jury.

The CHIEF JUSTICE asked, what would be the difference between sending him now, and some time hence, when the question about his pardon shall have been settled.

Mr. HAY replied, that he was anxious to introduce his evidence before the Grand Jury in a chronological order; and, that if Dr. B's was suspended, it would make a chasm in his argument: however, it was of very little consequence to him, whether he was sent now, or some time hence.

CHIEF JUSTICE. What is the particular point before the Court?

Mr. MARTIN. Dr. B. is not pardoned, and no man is bound to criminate himself.

CHIEF JUSTICE. What precedents have you?

Mr. MARTIN. I am prepared to shew, that a party even possessed of a pardon, is still indictable by the Grand Jury, unless he has pleaded it in Court.

Mr. HAY. Sir, may we send the other witnesses to the Jury?

CHIEF JUSTICE. Certainly. Mr. Bollman may in the mean time be suspended.

Four other witnesses were then sworn.

Mr. HAY. I now propose to send Dr. Bollman to the Grand Jury. At this time the Marshal entered, and Mr. Hay informed the Court, that the Grand Jury had sent for the article of the Constitution, and the laws of Congress, relating to Treason and Misdemeanor.

Some desultory conversation here ensued between the Bar and the Court respecting Dr. B.—when

Mr. HAY addressed the opposite Counsel: Are you then willing to hear Dr. B. indicted? Take care in what an awful condition you are placing this gentleman.

Mr. MARTIN. Dr. Bollman, Sir, has lived too long to be alarmed by such menaces. He is a man of too much honor to trust his reputation to the course which you prescribe for him.

CHIEF JUSTICE. There can be no question but Dr. B. can go up to the Jury: but, the question is, whether he is pardoned or not. If the Executive should refuse to pardon him, he is certainly not pardoned.

Mr. MARTIN. But there can be no doubt, if he chooses to decline his pardon, that he stands in the situation with every other witness, who cannot be forced to criminate themselves.

Some desultory conversation here ensued,—when

Mr. HAY observed, that he should extremely regret the loss of Dr. B's testimony: he believed it to be material: he trusted that he should obtain it, however reluctantly given. The Court would perceive that Dr. Bollman now possessed so much zeal, as even to encounter the risk of an indictment for treason. Whether he should appear before the Grand Jury under the circumstance of a pardon being annexed to his name, might hereafter become the object of a distinct arrangement. In the mean time, he might go up without any such notification.

COUNSEL for Mr. Burr acquiesced.

CHIEF JUSTICE. Whether he is really pardoned or not, I cannot at present declare. I must take time to deliberate.

Mr. HAY. Categorically, then, I ask you, Mr. Bollman, do you accept your pardon?

Mr. BOLLMAN. I have already answered that question several times. I say no: and, I repeat that I would have refused it before, but that I wished this opportunity of publicly declaring it.

Mr. HAY. If the Grand Jury have any doubts about the questions that they put to Dr. B. they can apply to the Court for instructions. I assert, Sir, that Mr. Bollman *is a pardoned man.* I wish the opposite Counsel to prove that he *is not.* I therefore move, Sir, that he be sent up to the Grand Jury, certified by you, that he is pardoned. I make this motion, that gentlemen who wish to discuss the question, may have an opportunity of producing their arguments.

Mr. WILLIAMS, Counsel for Mr. Bollman. There are 3 questions to be decided.—

1. Whether a witness is bound to answer any questions which *tends* to criminate himself, or affords a clue to evidence for that purpose? The operation of a pardon, whether it changes the question? but, in this case it having been refused, the Court cannot notice it. Who is to be the Judge, the witness or the Court, as to the propriety of answering the question?

On the first question, Mr. Wickham laid down the following propositions:—

1. The rule of law is, that no man shall answer any question which shall accuse himself.

[1 M'Nally's evidence, 256—2 Hawkins, c. 46.]

2. He shall not be bound to answer any questions which shall accuse himself of a Misdemeanor.

[1 M'Nal. 256.]

3. He shall not be called upon to calumniate himself.

[1 M'Nal. 256—2 St. Tri. 822–1035, Talsborough's case.]

4. He is not to defame himself.

[1 M'Nal. 256–258—2 St. Tri. 439.]

5. Not to answer ensnaring questions.

[M'Nal. 256.]

6. To ask a man if he is a Roman Catholic, is not permitted.

[M'Nal. 257—9 St. Tri. 414—2 Dougl. 593.]

7. Not bound to answer any question which tends to criminate himself.

[M'Nal. 257—4 St. Tri. 605–606.]

8. The case of Goosely, in this Court, was called; who had been acquitted, the day before, by the Grand Jury.

[So. 1 Black. Ress. 27.]

As to the 2d question, the rule of law is the same, even if the man be pardoned.

1. A witness, although pardoned, shall not be bound to calumniate himself; for, the pardon having placed him in *statu quo*, no question shall be asked him, which shall tend to make him contemptible, or do away the benefit of the pardon.

[1 M'Nal. 256—2 St. Tri. 822–1035.]

2. If bound to acknowledge himself acquainted with any treason, he would be guilty of a very high misdemeanor; and, therefore, do away any benefit from the pardon: But, the Court cannot notice pardon, unless pardon by statute; for, if under the great seal, and accepted, yet it would be error in the Court to allow it, if not pleaded.

[2 Hawkins, c. 37, sec. 59, p. 64–65—5 Bac. 294.]

3. If a party is entitled upon pleading it, then if he refuses, the Court cannot take notice of it.—Here a party refusing, the Court must say not pardoned; for, until it is pleaded, the party is liable to be punished; because, if he pleads not guilty, the Court will not allow him to plead it afterwards.

[2 Haw. c. 37, sec. 52—Bac. 294.]

As to the 3d question, the witness must be the judge, of necessity.

1. Because he can only know what the answer is, and the bearing it will have.

2. If the Court decide, they must know what would be the answer; and, to get that from the witness, would criminate himself; which, I have shewn, he is not bo

If it be objected that by this means, no witness would give evidence against the accused, it may be answered—

1. The refusal is upon oath; because he affirms, that to answer it, would be to criminate himself.

2. You have the same obligation on him to answer that truly, as to speak truth upon any other subject.

3. If he perjures himself, in that he would certainly do it, to get clear of giving evidence against the accused.

4. It is his privilege not to answer any question having that tendency.

5. The rule is upon the following authorities:—

This Court in a case in 1743, in 4 St. Tri. 414 note, states to wit.—"If you think it will criminate yourself, you need not answer it." 1 M'Nal. 257-8, it is put to the witness, and not to the Court, because he knew what was to be the answer. If he objected that nothing is evidence against him, which he may say on his oath, the answer is, that it has been otherwise decided.—2 Dougl. 593.

Mr. MARTIN would merely suggest a few additional authorities: among these, were 5 Bac. p. 293—2 Hawkins, c. 37, p. 59-60-65. Mr. M. contended, that these authorities demonstrated that there were two kinds of pardons in England: one by Parliment, and the other under the Great Seal: that the first exempted an individual from the cognizance of the Court as to the particular crime for which he might stand charged; but, that the latter was no bar to a judicial prosecution; and, was not indeed effectual, until it had been pleaded and allowed in Court. Mr. M. also quoted an authority from Salked, to shew, in corroboration of Mr. W's position, that no witness, however exempted from the charge and necessity of criminating himself—however responsible on that account to the law—can be made to diseredit himself by his own testimony.

Mr. WILLIAMS also quoted another authority to the same effect, from p. 258 of M'Nally's Evidence.

Mr. M'RAE. It is extremely uncertain, Sir, whether Mr. Bollman will, or will not, answer the questions which may be propounded to him by the Grand Jury. If he is the very honourable man, which these gentlemen have represented, he certainly will not refuse to answer. But, if he does refuse, it can only be upon the ground that he is really criminal. It is not, therefore, necessary for us to determine this point at the present time. It is not necessary to decide whether Dr. B. is, or is not, a pardoned man: we do sincerely hope, that he will appear in the character of an honorable man, and not refuse to answer the interrogatories of the Grand Jury. But, if he should pursue that course, it will be then time enough for us to bring this discussion before the Court.

Mr. HAY. The proposition which I had stated, seems to me to be so evident, as to require little argument. I consider Dr. B. as a pardoned man; and, therefore, I desired that the Court should certify that fact for the instruction of the Grand Jury. Gentlemen, [illegible] the very point for which we

are contending. Why do they so much expatiate on the consequences of a pardon, if they do not consider that one has been already established? Why do they wish to screen Dr. B. under the plea that he cannot be made to defame himself, unless they consider him not sufficiently secured by the possession of a pardon? As to the effect of a pardon, it is a distinct question, on which the Court may hereafter instruct the Grand Jury. But, at present, I wish the Court merely to certify that he is pardoned.

Mr. MARTIN replied, that if the gentleman had attended to his argument, he would have seen, that most of his authorities had borne upon the existence of a pardon, and not upon the effects of one.

CHIEF JUSTICE. Have any of you authorities to shew when the pardon operates?

Mr. MARTIN. Certainly from the time of pleading.

CHIEF JUSTICE. You mistake my question. Suppose the pardon to be lost, is it then valid?

Mr. MARTIN. If it be proved that he has pleaded to an indictment, I presume an exemplification of it would answer every purpose.

As another reason, Sir, why Dr. Bollman has refused this pardon, permit me to say, that it would be considered as an admission of guilt. Dr. B. does not admit that he has been guilty. He does not consider that a pardon is necessary for an innocent man. Dr. B. Sir, knows what he has to fear from the persecution of an angry government: but, he will brave it all. The man who did so much to rescue the Marquis La Fayette from his imprisonment, and who has been known at so many Courts, bears too great a regard for his reputation, to wish to have it sounded throughout Europe, that he was compelled to abandon his honour, through a fear of an unjust persecution.

After some desultory conversation, Dr. Bollman was sent up to the Grand Jury, without any particular notification. The question, whether he is pardoned—and, of course, how far he may be called upon to disclose all that he knows—are reserved for future discussion and decision.

Mr. HAY requested leave to inform the Grand Jury, that fatigue alone had prevented Gen. Wilkinson from attending them on that day; but, that he should appear before them on Monday.

The Court then adjourned until Monday 11 o'clock.

Circuit Court of the United States,

MONDAY, June 15, 1807.

Mr. HAY directed the Deputy Marshal to request General Wilkinson to come into Court. In a few minutes he entered; and, after he had taken the oath at the Clerk's table—Mr. Hay enquired of the Court whether he was at liberty to communicate to the Grand Jury through the Marshal, that their immediate examination of Gen. W. might perhaps facilitate their enquiries: and then Gen. W. attended the Marshal to the Jury room.

Mr. Hay stated, that the opposite Counsel had objected to the tenor of the *oath* which had been administered to the witnesses. Will the Court instruct the Clerk on the subject?

Mr. BOTTS stated, he did not approve of the form in which the oath was administered; that this objection, however, did not come from col. B. that there was some variation between the present, and other forms; but, that if the Attorney for the United States was satisfied with the form, col. B's Counsel would acquiesce.

Mr. HAY. There are now four indictments before the Grand Jury; two of them against A. Burr for Treason and for a Misdemeanor; and two against Herman Blannerhasset for the same offences; and, it was this circumstance, which dictated the general form of the oath.

The CHIEF JUSTICE presumed that this form was not less obligatory, than if all the indictments had been particularly enumerated.

Mr. HAY. It is the general form, Sir, to give true answers to such qestions as the Grand Jury may ask.

Mr. WICKHAM stated, that as the indictments were now pending before the Grand Jury, it was necessary to recall to the memory of the Court, a circumstance which had been early suggested—that a number of improper *papers* might be exhibited before the Grand Jury. The Attorney for the United States had indeed pledged himself to send up no papers, which had not previously passed the inspection of the Court; but, it had since occurred to col. Burr's Counsel, that the witnesses themselves might carry up such papers. The object of this promise would be entirely defeated, if papers were thus to be carried, instead of being sent up. It would be changing too the the very functions of a witness—whose business it was to give testimony, and not to carry papers. Finding that nothing could be done without an application to the Court, Mr. W. submitted it to them, whether they ought not to instruct the Grand Jury to receive no papers, but through the medium of the Court.

Mr. HAY hoped that the Court would not act upon a mere suspicion, that witnesses will carry up improper papers. It was extremely probable, that Gen. W. in delivering his evidence before the Grand Jury, may have occasion to resort to certain letters that he has received, and to certain documents, which would assist to give the history of these transactions. He would not produce these as distinct and substantive evidence, but as so many private memoranda; which (such was the nature of the human mind) he ought, and must resort to, to make his narrative more connected and distinct. Mr. H. hoped, that after the splendid example of patience which the Grand Jury had displayed, they would not be interrupted in the examination which was now commenced; but that he had no objections to the Court's sending up by word or by writing, such instructions to them on this subject, as the Court might think proper.

Mr. BOTTS confessed, that this opposition surprized him. On a former day he understood that no papers were to go before the Grand Jury, but those which had been inspected by the Court.

Mr. HAY requested leave to explain. He had promised before the arrival of Gen. W. to send up no papers without the inspection of the Court; that he had at that time several authenticated papers—several affidavits; and that he had an impression (though not a very decided one) that they ought not to be submitted to the Grand Jury. At that time gentlemen seemed to think that certain papers and cyphered letters were to be sent up without any previous motion: he would still pledge himself to avoid this course. But it might happen, that Gen. W. had various papers to connect the narrative of his conduct. It is probable that he has those very papers in his pocket, and would resort to them. If Gen. W. has brought these with him from New-Orleans, and produces them before the Grand Jury, Mr. H. hoped, that gentlemen would not, therefore, accuse him of a breach of faith.

Mr. BOTTS believed, that the Attorney for the United States was incapable of any thing like a breach of promise: but, while he was willing to admit his intelligence and honor, he would say without seeming to cast a reproach upon a character whose head and heart were inferior to none, that this gentleman felt a strong bias which ought to be vigilantly watched. He was still surprized at the gentleman's proceedings; because, the very principle which he supports as to the papers themselves, would go to prevent the introduction of witnesses before the Grand Jury. Papers he admits are not proper to go before the Grand Jury; and, therefore, if witnesses are to carry them, they themselves ought not to go. If Mr. H. were called before the Jury, he would produce no papers but what had passed through the Court. But Mr. H. is not the only prosecutor in this business. There is another equally active. Mr. H. admits that this zealous prosecutor may produce his papers before the Jury. If he merely produces papers, for the purpose of refreshing his memory, any instruction which may go from the Court, will be perfectly innocent in its effects; but it is possible that such

an instruction may be necessary to repress the introduction of very improper papers,—which he might hope to convey to the multitude abroad, through the channel of the Grand Jury. There was a particular reason to recommend this vigilance. It was understood that a species of plunder of papers had been permitted; that the post offices had been robbed. Should such papers, which came in this manner into the possession of the United States, be permitted to be laid before the Grand Jury, without previously passing through the ordeal of the Court? Mr. B. here cited as an authority from the 8th vol. of American Museum, Judge Gripp's charge to the Grand Jury.

CHIEF JUSTICE. No affidavits ought to be sent up; and no papers containing distinct, substantive testimony against the accused.

Mr. HAY. I am willing to adhere substantially and literally to my promise. I know not what papers Gen. Wilkinson may choose to employ. I was with him yesterday, and saw a whole volume of papers; but it was impossible for me to know which of them he intended to produce. If gentlemen wish to know the object of my visit, I will tell them.

Mr. MARTIN. It is unnecessary.

Mr. HAY. I have said in this Court, that it was not my business to defend Gen. Wilkinson; but the result of my conversation yesterday is, that it is my duty to defend him; and my impression is, that I shall defend an honest man and a patriot. All the suspicions which I had imbibed from the mysterious circumstances of the times, have completely vanished; and, I am now fully impressed with the conviction of his unsullied integrity. I shall advance up to his defence with the most perfect sincerity.

Mr. MARTIN. I have no doubt that the gentleman has taken a very good way to remove his unfavourable impressions; if that can be called a good one, which consists in hearing but one side of a cause. If he would but hear Col. Burr's story in the same way, perhaps his impressions against him might also be removed.

Mr. HAY. I have heard his story from his Counsel, but they have more strongly confirmed my opinions.

Mr. WIRT said, that he had looked over the authority quoted by Mr. Botts, and was satisfied that the papers referred to by Judge Gripp, were only affidavits; (Mr. W. made quotations to prove this position)—that it was in some cases necessary to resort to written papers, as the very best testimony: for example: suppose that Gen. W. should state, that on such a day he received a letter from A. Burr by the hands of Bollman or Swartwout, might he not say to the Jury, "Here is the letter—I am ready to read it:" Would it not be competent for a Grand or even a Petit Jury to hear it? Such letters are the very best evidence of their own contents; and before a Petit, and of course before a Grand Jury, they are much more proper to be produced than any statement of their own contents. Again: suppose Gen. W. was to mention the

cyphered letter: would it not be competent for the Jury, or for the gentlemen on the other side, to say, "produce it: we shall receive its contents?" This remark evidently shews, that if the objection now suggested to papers, extends to all, it is perfectly fallacious; and, that sometimes they are not only evidence, but the very best evidence in themselves.

Mr. WICKHAM expatiated at some length upon this point. He reminded the Court of the case which happened before the highest tribunal in this country, the Senate of the United States, where a witness (Mr. Hay), was forbid the use of his papers, even to refresh his memory.

Mr. HAY replied that he knew not, and cared not what they decided; but, if they had decided at all, he would assert that the very persons who did so, knew that they were deciding contrary to law.

Mr. BOTTS said, that the Senate had so decided; and, it was composed of the ablest lawyers from all parts of the Union.

Mr. HAY contested the fact of decision.

Mr. MARTIN contended, that the Court was to judge what evidence was to go before the Grand Jury. He cited Danby's case, where a witness gave a deposition under the statute of William and Mary; he prevaricated before the Grand Jury, and they sent for his deposition. The Court decided they should not have it, because not proper for them.

The CHIEF JUSTICE here delivered the opinion of the Court; which he reduced to writing, for the purpose of laying it before the Grand Jury. It went to instruct the Grand Jury, not to inspect any papers, but what were necessary to connect the narrative of the witness.

Mr. HAY objected to this form of instruction. Suppose the papers were from another hand, for instance Dr. Bollman, really connected with A. Burr—these papers might have had a material influence upon Gen. Wilkinson's conduct: was it not necessary, to the integrality of his testimony, that these too should be exhibited?

CHIEF JUSTICE. These papers do not bear upon the accused person, but only upon the witness.

Mr. HAY. But they bear upon Col. B. in that very way. The western papers have represented Gen. W. as connected with Col. B. and, the language of the cyphered letter, seems to countenance the conjecture. It may be necessary to exhibit these papers to support the credit of the witness.

CHIEF JUSTICE. It may then be added, that such papers relate merely to the credit of Gen. W. and are not intended to inculpate the accused.

Mr. WICKHAM. It is Col. Burr who is on his trial, and not Gen. Wilkinson. It is true that these papers do not criminate Col. Burr, but they bear upon him by vindicating Gen. W: and it is a sound rule of law, that what cannot be done directly, may not be done indirectly.

Mr. WIRT. It is the privilege of the Grand Jury to judge of the credibility of a witness. If they doubt his veracity, they have a right to be satisfied upon the point. They may call upon him to say, "why is this, and why was that?" and he may explain, by the production of his papers. If this were not the case, the Grand Jury would not know whether to believe him.

Mr. HAY suggested an alteration in the form of instruction; that any paper might be exhibited, which came from the person accused, or by any other person, proved to be the accomplice of the accused, that formed a part, or was explanatory of the narrative.

The CHIEF JUSTICE wished to send some specific instruction to the Grand Jury to prevent the *delay* which would arise from the coming into Court, when they had a particular paper before them, in which they would demand the instruction of the Court.

Mr. HAY contended for the alteration which he had suggested. He quoted an English case to shew, that when a man was first proved to be connected with others, what was then in proof against the others, was also good against him. He quoted the case of the Corresponding London Society to the same effect.

[Here a long, desultory argument was continued upon the *form* of instruction. The argument principally turned upon two points: 1st—how far the papers of those persons, that were said to be connected with Mr Burr, could be introduced to fill up the narrative of the witness: and 2d—whether it was proper, formally to declare in the written instruction to the Jury, whether the papers were only to be introduced to support the credit of the witness.

The form was at length composed by the Chief Justice, and transmitted to the Grand Jury by the Marshal. Its contents were not read to the Court; and as it is now in the possession of the Grand Jury, it is impossible for us to present a correct transcript of its contents.]

Mr HAY at length addressed the Court. The Grand Jury have sent for Dr. Bollman; and they will want him to decypher, if he can, the cyphered letter which I hold in my hand. [This was the letter, partly in German and partly in cypher, and addressed to some person in New-Orleans, which we have already mentioned.] Mr Willie, (the reputed Secretary of Mr Burr) will prove the identity of the paper, and Dr. Bollman will interpret it.

After a considerable time, Mr. Willie appeared in Court, when Mr. HAY proceeded.

This is the paper, Sir, which I shall disannex from the affidavit accompanying it, and wish it to be transmitted to the Grand Jury. It is addressed, I understand, to Dr. Bollman, under a fictitious name: and it is all in the hand-writing of Mr. Willie. [It is proper to remark, that in these observations Mr H. alluded to the annexed paper, which was an affidavit of Willie's, and was said to relate to these circumstances.]

Mr. BOTTS objected to its being sent up to the Grand Jury. He understood, that no paper was to be laid before them, which

was not material to the cause, whether it could, or could not be authenticated. Let the gentlemen, then, explain the contents and materiality of that paper.

Mr Hay. A hard proposition, indeed! when it is partly written in cyphers, and partly in German. I deem it material, however, because I understand that it was either dictated by the accused; or first written, and afterwards copied by his Secretary: and that it is addressed to Henry Wilbourne, *alias* Erick Bollman.

Mr Wirt. I understand, that any paper may be sent up under the instruction which has just been transmitted to the Jury.

Mr. Burr. The paper is before the Court. It is now in the possession of the Court; and, it is not to be sent up to the Grand Jury, but under the judgment of the Court: of course, the judgment of the Court should be satisfied with the materiality of this paper.

Mr. Hay. The accused is mistaken in point of fact. The paper is now in my possession.

Mr. Wickham. Why was it offered to the Court, if it was not to be put into their possession? But if it was not in their possession—if it was merely brought into Court, that it may be sent to the Grand Jury—any paper may be conveyed to them through the same process. Mr. Hay asserts, that it is addressed to E. Bollman. But is not the Post-Office mark on it? Was it not obtained by an act of felony?

Mr. Hay. There is no Post-Office mark on it. Mr. H. then expiated at considerable length on the point. He denied that the paper was in the possession of the Court; and, asserted his right to send up any paper to the Jury, under the direction which they had already received.

Mr. Wickham. I wish to know, whether he offers it to the Court.

Mr. Hay. No.

Mr. Wickham. How then can any notice be taken of it? How can he send it up? By the Marshal—*he* is the officer of this Court. By Mr Willie?—he is only a witness. If the paper goes up at all it is under the sanction of the Court. If a living witness goes up it is because he is presumed to be a relevant witness. But if it be a paper, how can its relevancy be established, until its contents and materiality are known?

Mr. Wirt. May not the difficulty be removed, by the Court's inclosing it in another paper, with an endorsement that it is sent up under the last instructions? By those instructions they will judge; and, unless it is shewn to come from A. Burr, or under his authority, they will of course reject it.

Some altercation then took place between Messrs. Wickham and Wirt, for a moment—when Mr. Botts objected to the transmission of the paper. It was either immaterial or it was not. If it was immaterial, why embarrass the Grand Jury with it? But if it contained pertinent matter, it was certainly wicked matter;

which Mr. Willie may be himself concerned. If he be sent to the Grand Jury with this paper, what would he say about it? Would the Court wish him to say any thing which might criminate himself? We have a right said Mr. B. to see this paper. Perhaps we shall find that it has been filched from the Post-Office, contrary to the 6th amendment of the Constitution, which protects every man's papers from unreasonable searches and seizures. If it has been obtained by such illegal and violent means, the Court would perhaps arrest it; and even the Grand Jury would not dirty their fingers with it.

Some desultory conversation ensued, when Mr. Willie was called into Court. Mr. WILLIAMS (his Counsel) hoped, that no question would be put, the answer of which might tend to criminate himself.

Mr. HAY. Wait till the question is put.

Mr. M'RAE. Did you copy this paper.

Mr. WILLIAMS (after consulting his client). He says, that if any paper he has written, has any effect upon any other person, it will as such affect himself.

Mr. WIRT. He has sworn in his deposition, that he did not understand the cyphers of this letter. How then can his merely copying of this letter, implicate himself in a crime; when, he should not only copy it, but be privy to its contents?

Mr. M'RAE. We will change our question. Do you understand the contents of that paper?

Mr. WILLIAMS. He objects to answering. He says that though that question may be an innocent one, yet the Counsel for the prosecution might gradually go from one to another, until he at last obtained matter enough to criminate him.

Mr. M'RAE. My question is not, do you understand this letter? And *then*, what are its contentets? If I pursued this course, I might then propound a question, to which he might object. But unless I take that course, how can he be criminated?

Mr. BOTTS. If a man knows of treasonable matter, and does not disclose it, he is guilty of a misprision of Treason. Two circumstances, therefore, constitute this crime: a knowledge of the Treason, and a concealment of it. The knowledge again comprehends two ideas: that he must have seen, and understood the Treasonable matter. To one of these points, Mr. W. is called upon to depose. If this be established, who knows but the other elements of the crime may be gradually unfolded?

Mr. M'RAE. I did not first ask if he copied, and then understood it; but first, if he understood it. Had he answered this question in the affirmative, I certainly should not have pressed the other question upon him, because that might have amounted to a self crimination.

Mr. HAY. I will simply ask him, whether he knows this letter to be written by A. Burr, or by some one under his authority.

Mr. WILLIAMS. He refuses to answer: It might tend to criminate him.

The Court were of opinion that Mr Willie should answer upon oath, whether or not he thought that answering the proposed question might have a tendency to criminate himself.

Mr. WILIE replied, it might criminate him in the event of a certain case.

Here a long and desultory argument ensued, which was terminated by a promise from Col. B's Counsel, to produce their authorities before the Court to-morrow, to shew that Willie could not be compelled to answer such questions as might in his own opinion tend to criminate himself.

TUESDAY, June 16.

Mr. HAY produced, and read the following letter from the President of the United States.

WASHINGTON, *June* 12, 1807.

SIR,

Your letter of the 9th, is this moment received. Reserving the necessary right of the President of the United States to decide, independent of all other authority, what papers, coming to him as President, the public interests permit to be communicated; and to whom, I assure you of my readiness, under that restriction, voluntarily to furnish on all occasions, whatever the purposes of justice may require. But the letter of Gen. Wilkinson of Oct. 21, requested for the defence of Col. Burr, with every other paper relating to the charges against him, which were in my possession when the Attorney General went on to Richmond in March, I then delivered to him; and I have always taken for granted, he left the whole with you. If he did, and the bundle retains the order in which I had arranged it, you will readily find the letter desired, under the date of its receipt, which was November 25; but lest the Attorney General should not have left those papers with you, I this day write to him to forward this one by post. An uncertainty whether he is at Philadelphia, Wilmington, or Newcastle, may produce delay in his receiving my letter, of which it is proper you should be apprised. But as I do not recollect the whole contents of that letter, I must beg leave to devolve on you the exercise of that discretion, which it would be my right and duty to exercise, by withholding the communication of any parts of the letter, which are not directly material for the purpose of justice.

With this application, which is specific, a prompt compliance is practicable; but when the request goes to "copies of the orders issued in relation to Col. Burr, to the officers at Orleans, Natchez, and by the Secretaries of the War and Navy Departments," it seems to cover a correspondence of many months with such a variety of officers, civil and military, all over the United States, as would amount to the laying open the whole executive books. I have desired the Secretary at War to examine his official communications; and, on a view of these, we may be able to judge what can, and ought to be done towards a compliance with the request,

If the Defendant alleges that there was any particular order which, as a cause, produced any particular act on his part—then he must know what this order was, can specify it, and a prompt answer can be given. If the *object* had been specified, we might then have had some guide for our conjectures as to what part of the Executive Records might be useful to him. But, with a perfect willingness to do what is right, we are without the indications which may enable us to do it. If the researches of the Secretary at War should produce any thing proper for communication, and pertinent to any point we can conceive in the defence before the Court, it shall be forwarded to you. I salute you with esteem and respect.

TH: JEFFERSON.

GEORGE HAY, ESQ.

Some conversation ensued about the specification of the papers wanted from the Executive.

Mr. HAY stated, that in his communication to the President, to which this letter was a reply, he had mentioned the papers in those terms, in which he conceived it would be most likely that they would be described by the opposite Counsel. It seemed, however, that the President did not consider this description as sufficient.

Col. B's COUNSEL then stated, that they had sent an express to Washington for these papers, with a subpœna to the President; and, that it would appear on the return, whether they could obtain such papers as they wanted.

Mr. HAY then begged leave to call the attention of the Court to a subject, which had been agitated yesterday. He observed, that Dr. Bollman had gone up before the Grand Jury; what his answers were, he knew not; but he presumed that the same instructions were as necessary for him, as for Willie; that when they were brought before the Grand Jury, Mr. Willie might substantiate, and Dr. Bollman might interpret the cyphered letter: that hence arose the necessity of the proposition, which he had already supported, that Dr. Bollman *was* a pardoned man, however humiliating the situation to which *he* might thus be reduced: And hence the necessity of submitting a second question to the Court—How far a man in Willie's situation, pretending to be an accomplice, might stand with his mouth shut, and refuse to answer every question which might be proposed?

Mr. BURR stated, that he had understood the question respecting Dr. Bollman, to have been disposed of the other day, by Mr. Hay's acquiescence. Dr. B. had been sent up before the Grand Jury; and according to Mr. H's own confession, he knows not but he has disclosed all his information without reserve. "We will go on with yesterday's motion."

Here a desultory conversation ensued; when Mr. Burr observed, that perhaps it would satisfy the Attorney for the United States,

if he consented (which he would now do) that it be certified to the Grand Jury, that Dr. Bollman had received a voluntary and unsolicited pardon from the President of the United States, which he had refused: For these were facts.

Mr. Hay. An immense distance, Sir, from the object of my wishes! I insist upon it, that Dr. Bollman is a pardoned man; and, under that character, I wish him to appear before the Grand Jury.

There is one reason, Sir, why I desire an immediate decision on this question. His evidence is now required before the Grand Jury; and, I wish him to go up under such qualifications, as may entitle them to the benefit of all his knowledge.

Chief Justice. The question is, whether Dr. Bollman is a pardoned man, though he refuses the President's pardon?

Dr. Bollman, (addressing the Court). I have answered every question that was put to me by the Grand Jury.

Mr. Hay. That is not the point: the Grand Jury may have waved a great number of questions.

Mr. Wirt. I will make one enquiry of the witness. Can he decypher this letter?

Mr. Martin. You must seek for another interpreter, Sir. You must do it yourself.

Mr. Hay. I have an interpreter at this moment under my eye.

Mr. M'Rae. I ask Dr. Bollman, to look at the German of this letter, and not at the cypher.

Mr. Martin. Let the Court say, whether that is a proper question.

The subject of Willie's testimony was then taken up.

The Chief Justice made some remarks upon the propriety of observing a certain order in the debate. It would be the best course, on every point of subordinate importance, for the Counsel on either side to open the motion; the opposite Counsel to reply; and the debate to be then closed by the party opening it, unless some new matter was brought out in the course of his remarks. Some desultory conversation ensued at the Bar, in which both parties acquiesced in the propriety of this arrangement; and, it was directed, that the argument and authorities should be heard, how far a witness may refuse to answer a question, which he thinks may criminate himself.

Mr. Botts. It has been again strongly insinuated, that Willie's claim to the privilege of not answering, pre-supposes his guilt.

Has Willie no reason to seek exemption from the examination, but such as may grow out of a consciousness of guilt?

The Attorney for the United States sees every object connected with Col. Burr, through a jaundiced medium. With him, "trifles as light as air, are confirmations as strong as holy writ."

How far he might be disposed to involve this young man upon a confession of copying a paper in cypher, though of harmless import, I am not prepared to say. But let Willie only commit

himself so far, and then be carried by his business to that poor, unfortunate, outlawed, enslaved, province of Lousiana, and abundant cause will be furnished for throwing him into a ship's hole, where he may be heard of no more; or, he may have the better fortune of transportation to Washington for trial.

The danger apprehended, grows out of no visionary estimates. We have not arrived at that point of our enquiry, which will probably arouse the indignation of our country. We shall very soon, Sir, give you an awful impression of the miseries of that ill-fated territory, under the total surrender of the civil authority to military guidance. I am driven prematurely to glance at one outrage, which may serve as a sample of the wretched state of that section of our dependencies. A citizen of the United States, now within the hearing of my voice, in a time of profound peace, was seized in New-Orleans; and, without being charged with any offence, but merely on suspicion that he could give evidence agrinst col. Burr in this Court, to which place he was willing to come. He was committed to prison without bail or main-prize; thrown into a stinking room, with the common felons and negroes confined there; and only taken out at last, to be transported to Richmond in custody. He was not even permitted to go to his lodgings to get a shirt; but, like a malefactor, he was forced to yield, in the humbleness of submission, to the will of his masters. Our revolutionary heroes were provoked to independence, in part, by the wrongs of transporting American criminals for trial to England; but, at this time, we are content with such a transportation, under circumstances of enormity, of one guilty of nothing but a suspected capacity to be a witness! Shall we not be careful how we furnish a pretext against this stranger now called to implicate himself, in what are called the treasons and misdemeanors of col. Burr; when, without this, he has suffered, (though in a less degree,) the same treatment as the abused individual from Orleans.

But it has been remarked, that my client and his Counsel had taken much interest in this privilege. We all feel interested in saving this inoffensive foreigner from the vengence of illegal power. Col. Burr, particularly, from the circumstance of having him in his service, is solicitous that he alone should feel the pressure of the unjust suspicion and prosecution.

But how did this letter come here? There is an exceeding foulness betrayed by that post-mark in the mode of its acquisition. [Mr. HAY said there was no post-mark.] The "25" on the back, is the only post-mark of many of the country post-offces. How came that mark there? Will the gentlemen say how that paper was acquired? If the post-office was robbed, the paper was gained feloniously. The Constitution has provided against the seizure of papers; and, the act of Congress has fixed the offence of stealing from the post-offiices. It is impossible that this most detestable vice of the most infamous of European Courts, can have been patronized by the government. By a familiarity of our rulers with

such hateful practices, the habits of the people would be demoralized. I beg the opposite Counsel to join me in arraigning an act which will disgrace all who had an agency in it. It must be a dreadful state of society, in which such an offence should be made the means of assisting to prove another. The Principal of this government, if here, would join in the denunciation. If it behoves the government to suppress a paper thus unconstitutionally, clandestinely, and illegally obtained—if they cannot use the end, without sanctifying the means—if they in the noble, generous spirit of a Chatham ministry, would disclaim every impure expedient—their able representatives here, would do well not to digrace their fingers with its touch.

Now for the abstract question of the law. The question put to Willie is, "do you understand that the original of this letter was written by col. "Burr?" [Mr. M'Rae. No: that is not the question last put. The present question is, "do you understand that part of the letter which is in cypher ?"] Very well. The gentlemen charge that this letter contains treasonable matter. [Mr. Hay. No such thing.] Then they must admit that it contains no treasonable matter. Hence the letter is irrelevant, and forms no subject for dicussion.

The rule is, that you shall not make the witness answer a question which may *tend* to implicate him in moral or legal turpitude. The witness himself must be the judge how far his answer may affect him: otherwise, if he was obliged to answer, for the Court to judge of its tendency, he would be surrendering his protection in the means of securing it. If the answer should tend to make up a single link in the chain of testimony necessary to involve him in suspicion, he has a right to decline the answer. The link cannot be perceived by the Judge to belong to the chain, without an exposure of every other part of it. The question culled from the State Trials was, "what profession are you of?" The witness was a Roman Catholic Priest, and the answer would have subjected him to penalties. The Court could not know what the answer would be, or that it would affect the witness; but the witness knew that it would. His right, therefore, to decline the answer, if *he thought* it would implicate him, was sustained. What question could be on its face more harmless, than the one resisted by that witness?

If the present question is answered, others must be put, which the witness cannot answer. His reason, or how he came to understand that part of the letter which is in cypher, ought to be put, if the one announced, is Gilb. L. of Ev. 134. Could he answer the 2d question; and, shall he tell half the truth, and have his lips closed as to the other half? It were better that he should tell the whole, though it were to involve hin in the prosecution with col. Burr.

I know nothing of the contents of this letter. It may have been written, for aught I know, by some young amorous intriguer to his mistress.

Before I set down, I will beg leave of the gentlemen, when they offer a paper for any purpose, to lodge it with the Clerk. We do not wish again to press upon the Court to rule such a measure without necessity; but, heretofore, we have been prevented from getting a sight of any paper, until the moment of discussion; and, then, not without difficulty.

Mr. WILLIAMS. I will now, Sir, beg leave to produce some authorities, to shew, 1st—that a witness is not bound to answer any question that might tend to criminate himself: 2d—that a witness is to be himself judge of what testimony he will give, and not the Court for him. The first of these propositions is established in M'Nally, pages 256-7-8; and also in Gurney's trial of Lord G. Gordon.

Mr. HAY. All this doctrine is admitted over and over again; and, indeed, I have said several times, that this witness could not criminate himself, let his answers be what they would.

Mr. WILLIAMS. Well, Sir, if a witness cannot, or ought not to criminate himself, the second question is, in my opinion, affirmatively answered—that he alone is the judge of what answer he will give. This is my second proposition. The rule of law before read, from Douglass 592, is—"That no man shall be bound to afford evidence against himself. If he says he is interested, then he affirms enough, and the Court go no further." Now the reason this rule obtained, was, that it was for the benefit of witnesses. He can know what would be his answer to a question, but no other person can. It is no matter how he came to any certain knowledge of a thing, if he says the answer might involve him in difficulties which he would wish to avoid.

But it may be said, that this would prevent a witness from giving testimony. But here the answer is ready; because no man, for the good of the Commonwealth, ought to be forced to convict himself. The witness is upon oath: Suppose his answer to be—"I cannot answer that question; because, if I do, it will convict myself." Therefore, we may justly suppose he speaks the truth; for, if he perjures himself in one thing, he would in another; and, therefore, he is to be believed. This is the law in M'Nally, 257; also in State trials. His own opinion is conlusive; because, even if he was interested, he is incompetent to be a witness; and, many cases occur, where interested persons are prevented from giving testimony. Again: There is a material obligation to a witness stating his testimony; because, then any bye-stander might be an evidence against him. He is avowedly the only judge. We have a case in 1 Blackstone, 37, of a man of Oxford college; where, although it was a Corporation Library under the care of a man, that man was not, nor could be forced to furnish books against himself. And, there is no case to be found, where it did not lie in the breast of the man himself.

Mr. MARTIN. The answer, Sir, must be one of two things: I do, or do not know. Now, be the answer which way soever it

might, it will, perhaps, by a circuitous course of questions, be discovered that he was guilty of misprision of Treason, if a Treason did exist. I understand that Mr. Willie has been announced as the Secretary of Col. Burr. Then, certainly Sir, if he knew of any thing criminal in the contents of the letter, he is answerable for it. It is offered here for the purpose of proving guilt, and a guilt which might be brought too closely upon the young man. Again, Sir, this Mr. Willie might, while with Col. Burr, have written twenty letters for what we know; and, as the Post-office has been put in requisition, contrary to the laws of the country, there might many of them come to light; and, therefore, though this might not, yet others might be brought against him.

Mr. HAY. Is this lawful and proper, Sir? There is no evidence before the Court, of those transactions alluded to by the gentleman. I hope the gentleman will not throw up these things. In order to afford him some satisfaction, if it be possible, upon this subject, I will tell him all the result of my enquiries. This letter was transmitted here by a Mr. Minikin, who came here with Mr. Willie. It was attached to an affidavit of Judge Toulman, and was forwarded to him by the Secretary of Louisiana. How he got possession of it, I know not; nor, do I care. It is wrong for gentlemen to talk about plundering the Post-office, without they can produce evidence to that effect.

Mr. BOTTS. Why did not Gen. Wilkinson send it here with the rest?

Mr. HAY. I do not know that Gen. Wilkinson ever knew any thing about it, or ever seen it.

Mr. MARTIN. What now appears? Why, that the letter is in the hands of the government, and they cannot tell how! Nobody thinks that the gentleman himself did this act; but, I will repeat, that the Post-offices have been violated. And, certainly Sir, when I see letters belonging to somebody else, with a Post-office mark upon them produced here, without shewing how they came into the hands of the government, it is a presumptive proof of the violation of the Post-office. I never will mince the matter. This gentleman might have written many letters in the same cypher, which may have got into the hands of the government in the same way; and though, to be sure, they will not call upon him to decypher, yet it may be, that some other person can do it; and, in this way, all the letters might become decyphered; and, of course, be evidence against him. There can be no doubt but the witness might refuse to answer any questions about the letter, if there be any thing criminal in it; but, will the gentleman undertake to say, there is nothing criminal in it? If so, we care nothing about it. But, Sir, the witness is no lawyer, to know how far this letter might criminate him, or into what danger it might involve him, if he should answer such questions as might be put. Now, if a witness is called upon in Court, where no such excuse can be made, he is liable to be committed.—[2 State trials, 124; Salkeld, 270; M'Nally, 337.

But in no case that I have ever met with, has a Court forced a person to disclose what might *tend* to criminate him.

Some observations were here thrown out, doubting the manner in which the letter came into the hands of the government. The Court recommended that gentlemen should argue one point at a time, and not wander from the question.

Mr. M'Rae. Before I proceed to reply to the observations that have just fallen, I must congratulate the gentlemen in the defence, the Court, and my fellow-citizens at large, that the proceedings on this enquiry, evinces most clearly, that it is not our wish to withhold, in any manner, instance or occasion, any testimony from the accused; or any means of defending himself, in every way that is fair. It is fortunate, indeed, for him, that this circumstance has occurred in the very way that it has: a spectacle truly extraordinary indeed has been exhibited; for, the Court is not only Counsel in his behalf, but Counsel employed by the witnesses themselves on the same side; and the accused, not satisfied with what the witnesses' Counsel could advance, have lent their talents to superadd every thing that could be adduced on the subject. Now, Sir, this although uncommon, meets my approbation; as every thing will, which may satisfy the accused that every thing is allowed to him that is possible.

I have endeavored to discover any thing that is serious or weighty in the observations made by those who have spoken; but, I must declare my efforts to be unavailing. I find that my worthy friends cannot rest satisfied in any question or point whatever, to adhere to the question before the Court. I regret that this has uniformly been the case. I beg leave to request them not to be continually inviting, through the medium of the Court, the attention of the people who assemble here; and, indeed, draw their attention to subjects by no means to the purpose. A great part of the observations were of this tendency; while results and wild conjectures occupied the place of the rest, and the witness was left subject to timid reflection.

Mr. Botts, instead of proceeding to discuss the question, has told the Court, that if the letter is of an innocent nature in itself, yet the most dreadful consequences might be expected to follow, if Mr. Willie should even again retread that territory; that he might expect to be thrown into the hold of some ship, where perhaps he might end his sufferings; or else be transported to Washington, to take his trial. Why, Sir, in my humble opinion, this has no bearing on the subject; it cannot be meant to affect the subject, but another purpose. But, perhaps, as these observations were not properly applicable, it is as improper that I should notice them; and, therefore, I shall pass them by, only by asking wherein is any relevency of his remarks to the case? It is impossible for me to discover it; and, yet, in this same course, have all the questions been treated, which have called for the attention of the Court. Certainly no proceedings that took place in that Territory, or conjectures (void of foundation)

of what might take place, have the least to do with the questions now to be propounded. Therefore, it seems to me that the gentleman's conjectures of how we came by this letter, are equally irrelevent. He has spoken with the same kind of confidence, and as void of foundation, respecting the post-mark, as he calls it—(the figures 25, which appear on the outside of the letter). He, or some gentleman, the other day, said it was common for many country post-offices to omit the name of the office, and only place the figures to disignate the price of conveyance. Now, all this is mere conjecture. On his part, whether this is a post-office mark or not, he knows not: but, he takes this, as he does every other opportunity, to endeavour to lessen the government in the eyes of the people, however unavailing may be his efforts. These figures might mean something very different from a post-office mark; and, as different from what he would wish them to be supposed to mean. By examining the cypher part of the letter, we may discover the figures 25 very often occur; and, I must be permitted to presume, that the figures on the face, and those on the back, have a significant meaning, as to the conveyance of it. But, in any event, there is no proof that the letter was ever lodged in a post-office; and, if it was, it would not relate to this question.

Then, said Mr. Botts, the letter must be trasonable, or not; and, if not, it is irrelevent. Why, we all know this: but, suppose it is treasonable? Ought not that fact, Sir, to be ascertained, if it be within our power to obtain it? This is what we want to know; but, whether it be so or not, does not immediately appertain to this state of the case. At some future time, its application must, if possible, be discovered, when a Jury shall take cognizance of the case.

Mr. Botts also stated, that if the letter be material, then the witness will subject himself to a prosecution: it fixes a crime on him, and he must be indicted. Now, Sir, this is assuming what is not proved, or probable. It must first be proved, that the letter is material; and, then, that the witness wrote it, or caused it to be written. If the witness wrote it, although it should be a treasonable letter, and he did not understand it, he committed no offence whatever; because, he was only made the ignorant agent of a man who dictated it to him, or for whom he copied it. He is not punishable under any law whatever. The worst that can be said is, that he ignorantly rendered service to an individual, as he thought, without intending any injury to the public; and, therefore, no law can punish him.

Mr. Botts has produced some authorities. The first he read, was from Gilbert's Evid. 134: But this case is not applicable, as it only relates to a doubtful witness. Now, was Willie before a Jury, and it could be proved that he had withheld any testimony, he might read that authority, to act upon the credit of the witness. It was also contended by all the gentlemen, that the witness was the only proper person to judge of any question that was propounded

to him. The case of Ryan, a Romish priest, was brought up. This man was questioned by the Court, as to his mode of procuring a living. He answered, that he was a Romish priest; but, the Court recalled the question and answer, by informing him, (for they knew what he was), that he need not exonerate himself, nor subject himself to any disability, to which the custom of that period rendered that profession of persons. But this case was very different from the present. The Judges knew what he was; and, therefore, warned him against it. In this case, the man has to decide for himself; but, from the nature of the questions, he cannot endanger himself.

I shall also notice a remark of Mr. Martin's, and his reference to State trials and Selkeld. For what reason is a man liable to be committed, suppose he refuses to give testimony? Because, Sir, he has a knowledge of the circumstances attending the case, and fails to give the evidence. He is under oath to speak the truth according to the best of his knowledge: failing to do which, the Court have power to commit him. They commit him because he has taken the oath; and, after he has taken it, for refusing to answer. Shall he not be longer under the power of the Court, but judge for himself, after he has taken the oath? He is, Sir, under the power of the Court until the facts be disclosed, or until the oath be completed. Every man is obliged to give evidence in any case, unless the effect upon himself, or his connection with the parties be such, as to disqualify him. Upon such declarations, the Court is induced to examine. They have a right to understand the foundation upon which he does object. If this be the case then, Sir, it rests not with the witness to decide, whether his evidence shall be given or not. I need not refer the Court to authorities, in order to prove this; because, every day's experience proves the doctrine. Indeed, I suppose the gentlemen will not question the point.—Then, when the Court have that right, it ought to use it. Suppose, for instance, a witness to be a professional character, an Attorney at Law: He is called upon to give evidence in a particular case: Suppose he should state to the Court, that he is a professional character, and could not give evidence—would not the Court require of him to declare, whether the matter at issue was delivered to him confidential as an Attorney, or otherwise shew the ground upon which he refused to answer? The Court would not be satisfied, that he should judge, whether it was of that confidential nature so as to withhold testimony; but require him to say, upon oath, whether it was delivered to him as an Attorney, or as a private citizen. On this ground, therefore, it is plain, that the Court will judge of the excuse. The Supreme Court of the United States decided this doctrine, as will be seen in 1 Cranch, 137; and in substance, in M'Nally, 225. The latter was a case of confession made to a Roman priest, which he refused to relate, because it would subject him to the disabilities of the law. The *Court*, on the reasoning, agreed to omit the examination, because the witness

would criminate himself; but, it was a principle established by them, *that it must so appear to the Court*, otherwise no declaration would be attended to. Now apply this to the case of Willie. He declares, "that he may criminate himself:" But how? Here is a question put to him: Do you understand this letter? The Court will see, that by answering either one way or the other, he cannot criminate himself. Suppose he answers "*No*"—the result would be evidently nugatory. But suppose he answers "*Yes*"—would that answer itself criminate him? It would not, Sir, unless there should be discovered an evident connection between this and some other question yet to be asked. Does that, in either event, prove that he had any connection with the writing of it? It is possible, Sir, that this key may have existed for a number of years; at least, a number of months; and, that this young man, being upon terms of correspondence with the accused, may have acquired a knowledge of his cypher: but this knowledge could not criminate him. Gentlemen seem to take it for granted, that he will criminate himself by his answer. I wish them to shew, how he can, before they make the broad declaration. Well, Sir, if he will not criminate himself, the United States are entitled to the benefit of his testimony. As to the main doctrine of crimination, there is no difference in our opinion: but, as to its application in this case, there is.

Mr. HAY. This appears to me to be as fruitless a discussion as ever occupied a Court; and gentlemen must excuse my expression of this my opinion of it. The subject of it is, however, extremely important. I believe the effects of that paper will be very great; and, to that apprehension, I ascribe the unexpected assiduity and solicitude to keep it out of view. I know not its contents; but, I wish to know them. In this, perhaps, they have the advantage of me; and, from their information, they may suppose there is something connected with that paper, which would prove to be injurious to the cause of their client. Mr. Burr is represented by the Counsel, as a *persecuted, innocent man*. I am then at liberty to ask, and I will ask those whose doctrine that is, "Why then does he shrink from the subject?" Does not innocence, Sir, walk forth with erect attitude; and, in the boldest defiance of the malice of its most inveterate enemies, rather court, than shun a minute examination? Yes, Sir; the contents of this paper would be disregarded; there would be no fear of developement: every species of evidence which malignity could invent, would be treated with scorn: and, even with the charge of Treason, standing before a Court of Justice, he would defy the utmost efforts of his enemies. I apply to the feelings and understandings of every man who hears me, if this be not conclusive?

Mr. Willie is brought here as a witness; a paper is in the hands of the prosecutor; and, the witness is asked, whether he knows the meaning of that paper in part? He will also be asked, whether he knows that this letter was written by Mr. Burr, or under his di-

tection? Now, Sir, to these questions the Counsel for Mr. Burr object. They tell the witness, that no man is bound to accuse himself; and add, that no man is bound to answer any questions that may *tend* to criminate himself. Now the Court will observe, that there are no facts propounded to the witness to answer, which can have the most distant legal connection, or furnish any sort of ground for any future prosecution. This objection is, therefore, merely to prevent the witness from giving evidence against a man accused of high crimes. The Court may suppose that he has some reason, or is somehow or other bound to secrecy: but the Court ought to know that reason. The Court, however, are called upon to decide this point; and, when they do, they do it under the presumption that this man was concerned with Burr—acted as his Secretary—attended him always during his expedition—wrote all his confidential letters—and is deeply concerned in the whole scheme: Then the question will be, under all these views, whether these interrogatories will subject him to all the penalties and prosecution of an accomplice? "But no," say the gentlemen, "this is not the point. Whether it will, or not have a tendency to criminate himself, the Court could readily decide; but, they have no right: He is to judge of that himself; lest, somehow or other, in a way that cannot even be discovered, but through various ramifications, some fibre might lead to a prosecution." How this may be, it is impossible, I am sure, for me to discover.

Sir, I must beg leave to refer you to the very book which has been quoted, (M'Nally, 256), where the great rule, the essence of all the law on the subject is laid down.—"A witness shall not answer any question which may oblige him to accuse himself of any crime." This is the law as taken from Hawkins, 609: and, I will venture to say, that the gentleman (Mr. Martin), cannot produce, notwithstanding his great researches, and long practice, one single case where a witness is not obliged to answer a question, if such may tend to subject him to a prosecution. But, Sir, the answer to these questions will not subject the man to a prosecution; or, in the most remote way, to any species of danger.

I will make a remark as to a case in State Trials, "that a man is not bound to calumniate himself." Several cases are related in M'Nally, 256–7, on this subject. Now, Sir, the principle determined in State Trials, is this: That where a witness is asked a question which has no relation to the case, and the answer to that question might degrade him in the eyes of others, he is not bound to answer it. It will be found that the questions were totally unconnected with the prosecution; and, that the object then, was only to degrade a witness in the eyes of the Court or Jury, that no credit might be given to him; or, that if an accused person, his character should be blackened by former crimes, or unfounded charges. These authorities have no bearing whatever upon the case.

I must now call upon the gentleman to tell me, how answers to these interrogatories can possibly be the subject of a prosecution?

We do not, nor do we mean to ask him how he came to know the contents of this letter, if he says he does know it; nor, do we mean to ask him, how he knows this to be written or dictated by Mr. Burr. No, Sir; these are fair questions, and formed purposely to avoid implicating the witness; but formed, so as to lead us, if possible, to the truth. Supposing the letter to contain guilt, (as I have no doubt whatever but it does), and he knew the whole of it, there could no harm come to him, if it was not treasonable. To be sure, if it was a treasonable letter, and he knew it, his crime would amount to misprision of treason; and, to avoid this, we cautiously put the questions. It is not whether he copied it; for whatever we may believe about that, we do not want him to confess. Here, Sir, we stop; and, most probably, shall not ask another question.

But the gentleman says, "the Court are not to judge." The question then is, whether evidence is, or is not to be carried before a Court, is to be decided by the Court, or by the witness? I am wonderfully surprized, I must confess, Sir, at hearing this novel doctrine. And yet it is spoken with as much confidence, as though it could not be answered; and with as much zeal, as though it was of vast importance. But, Sir, where is their authority? This Court has hitherto failed to find it out; for, it amounts to a doctrine diametrically opposite to every usage or practice here. This doctrine would intimidate every man; and, lead him to say, that he would not give his evidence fairly and fully, because he would think it possibly *might*, in some way or other, operate against himself. If this is a rule, why is it common for a Court to possess so much politeness towards witnesses? For no matter what his objection might be, you are not to know the circumstances: it is enough that he chooses to refuse giving testmony. If, Sir, a precedent of a decision in favour of this principle should be found, I was going to declare, that I would never again open my lips in a Court of Justice, because I should have little hopes indeed of success to promote the cause of justice.

Really, Sir, I did expect that something like authority would have been produced, to shew that it was the witness himself was to judge. Reference was made, to support this principle, by Mr. Williams, to Douglass, 592. But, in my opinion, he might as well have quoted that authority, to prove any proposition whatever, however distinct from the motion, that could enter into the human mind. Goosely's case was also quoted; but, I must say, that if it had been as stated by Mr. Wickham, it would not have been regarded as proper evidence. The Court would have passed it by, as they passed by the case of Cooper the other day—as a *solitary* case. A written report was produced in this Court, respecting the answers to be given by an accomplice. In that case, Judge Iredell decided, that he was not bound to answer. Now, Sir, let it be recollected, that *the Court* did this, and not merely upon the judgement of the witness. There is only one question which look

any thing like their doctrine; and that is, M'Nally, 414. This is the case of the Romish priest. There the Court said, "you need not answer the question—it may criminate yourself." But this does not come to the point.

The reason given by Mr. Williams, why the Court should not judge, was, that the answer itself must first be given, in order for the Court to know how to decide. Sir, the question need not be put by the Court: the Court need not know the reason; but, they may discover, or enquire enough into the situation of the case; and they will acquire sufficient understanding of it, to know the result that will be produced. They can cease pressing for an answer, whenever they find it probable that the witness will be going too far: and thus, I presume it was, in the several cases adduced. Mr. Williams considers it in the same view, as where a person is interested in a suit; and, therefore, his testimony is rendered wrong. I believe it is *law* respecting an interested person. And why is he not permitted to give evidence, if he says that he believes himself to be interested? Why the objection is made, because the witness has a bias in his mind. But here the witness does not object to his own competency: he claims the privilege. Then, surely, the Court must, and they are bound to enquire, why he claims this privilege. They must then be satisfied that it is so, or they will compel him to answer. Mr. Botts says, it may criminate him; and, therefore, he is not bound to answer; and, if it would not tend to criminate him, it would be irrelevent. Now, Sir, we do not pretend to know as to its crimination; but, we want to know what is in the letter. We believe that he can tell us what it contains; but, we shall not presume, after he has answered one question, to ask him to transcribe it, lest it might criminate him. We are, however, in hopes to obtain a translation of it: and, we cannot believe it to be irrelevant.

We have heard much, Sir, about the plunder of the post-office. It might be the case, for what I know; but, I think gentlemen should be able to prove it, before they talk so much about it. Could I not, with as much propriety, talk about plundering a City—getting at its Arsenal—and plundering its Bank. Knowing it, however, to have nothing to do with the business in this shape, more than the other has, I will not do it; but, the time may come, when this will call for our serious scrutiny. Who, Sir, has committed this plunder? They talk in very ambiguous terms, and scatter their unexplained hints all round them among the people; that, if they cannot convince them, they may mislead them. Sometimes these ambiguities are meant to operate against the President, who knows nothing at all about this letter: Sometimes against Gen. Wilkinson; and, sometimes against a certain Judge, before whom the deposition was taken. For my part, I do not know that ever this letter was in a post-office; and, nobody here can tell whether it was or not. But, suppose it was there; the postmaster, suspecting that it related to some treasonable design, sent

from one traitor to another, might give it to the Magistrate, or perhaps to the Commander in Chief of the Army. Do you call this plunder, Sir? If this was done by design, I must say it was an honest design. Sir; ought not a letter to be intercepted, when the welfare of a whole nation is at stake? Is this the time, when Treason stalks abroad in the country, or there are evident apprehensions of its approach, for men to act squeamishly, for fear some keen-eyed lawyer should be observant, and bring the affair into a Court? We know that desperate researches are necessary, when desperate treasons are on foot.

An answer to Mr. Martin, and I will have done. He was pleased to introduce an authority, expressly for the purpose of proving, that a Court will compel witnesses to be sworn, but not to answer. I hope I did not understand the gentleman.

Judge MARSHAL said, that the observation was, if he was correct, that there were many cases where Courts committed persons for not answering; but, if the Court permitted, it should not criminate.

Mr. HAY. I will venture to say, that wherever there was a refusal to answer a question that was a proper question, he was committed at the moment. Every Court will do this on the spot. Then, Sir, for what purpose is the observation made. The questions we have proposed, are proper questions. If they say that they ought not to be answered, it certainly is incumbent on them to shew it. But, at any rate, I think it to be a clear principle—that it is the Court, and not the witness nor the Bar that is to decide.

Mr. WIRT. This question has been discussed so much at length, that but little remains for me to advance. I shall, therefore, endeavour not to retread the ground my friends have gone over, nor darken their arguments by mine. The Counsel have travelled into a multiplicity of laws and precedents, antient and modern; point after point has been raised, until the gentlemen have really erected a perfect *chevaux de frize* on the stream of possibility; and, so ardently have they exerted themselves, that they seem to determine it to be right, to get the prisoner off, at all events. But, Sir, if they wish to wipe away the blot from his escutcheon, this is not the time, nor the mode to effect that desirable work; but, the time is, when the evidence is heard, and by a fair exposition of the testimony.

Sir, in this case, there is no evidence that Willie is an accomplice: it is merely an assumed position on the other side—and assumed for the purpose of strengthening their objection to his being heard as an evidence. But, Sir, I will go to prove, that even an accomplice is a competent witness; for "if no accomplices were to be admitted at witnesses, it would be difficult to convict the greatest offender."—2 Hawkins, 608; M'Nally, 193–4: referring to Keeling, 18—and Gilbert, 122: in all which, we have that doctrine amplified. I may safely, then, assume the position, that an accomplice is a competent witness; and, on the very points

in which he was an accomplice. And where is the use of his being a witness, if he is not to be interrogated? It had better be said, that he should not be a witness; for, the principle of itself will be of no use, if we are not to carry it into effect when it is wanted. It would be a nonentity, in fact.

But, Sir, I shall now proceed to state, that if this man is a competent witness, he is bound to share some legal principle—some principle of law—which (as a learned Judge says), "is as clear as light itself." Else he cannot be excused from answering interrogatories, which are proper in their nature, and pointed in their application. See M'Nally, 247, and 253–4–5. The gentlemen now say, that the witness is exempt from answering by positive law, under the circumstances mentioned in Hawkins, ch. 46, sec. 20, p. 609—"No witness shall be obliged to answer questions which may accuse himself of a crime." This is copied in M'Nally; and, as all the gentlemen have depended upon it, it may be worthy of a little notice. Sir, if the answer would make him necessarily accuse himself of a crime, we admit that he would not be bound to answer to his own conviction; but he is bound to answer, either affirmatively or negatively, where there would be no proof of the commission of guilt in himself. But here the gentlemen have bound it up to a narrow rule indeed, by rendering the principle so vague, that there is no designating it. In what situation have they placed it? They say that, if it *tends* to criminate, the witness shall not be bound to answer. *Tend:* What do gentlemen mean by this word? How near, or far removed, or wherein is this *tendency* to be found? I demand the rule for this uncertain term: I demand its definition. Is it without bounds? If so, it is almighty indeed, and it will be in vain for us to attempt its discovery. Now, suppose I was to ask this man, whether he knew Mr. Burr? He would tell me, by this doctrine, that he would not answer me, because it might *tend* to implicate him in some distant way, by the tendency of other answers which he might be called upon to give. But, Sir, I will say, that if I ask him a question which in itself is not immediately improper, he is bound to answer me; although other questions going beyond it, would tend to, and would indeed criminate him: until those questions should come that would criminate him, he is not to stop answering. Well, then, he is a competent witness, although he is an accomplice. And, besides, it has been proved, that the law limits the enquiry to the question in dispute; and hence our opponents who have produced such numerous cases where irrelevant questions have been asked, have taken the precedents upon wrong ground, when they attempted to prove their doctrine.

What are the questions to be asked, then; and, what must the answers lead to? The questions are, 1st—Do you understand the contents of that letter? 2nd—Was this letter written by the hand, or direction of Aaron Burr? Now, Sir, suppose he says "No," or "Yes," to these questions—does that criminate him? Cer-

tainly, if we go on unduly in questioning, the Court will stop us. But gentlemen go on with all the face of fairness in the case, as though we were to ask every species of question which may have a deleterious tendency—anticipating and assuming all our ground for us: and, in idea, (for that is all they can do), pointing out what the contents of this letter are. But, Sir, I repeat, that no answer which he could give to this question, would criminate him. It would require many other links to make this chain; that is, to bind Mr. Willie. Now, Sir, does not this glossary of the gentlemen go to the entire subversion of every principle of propriety and rationality? What is the use of accomplices being witnesses at all, if it be not to discover crimes, and fix them on their perpetrators?

I will state another position. Suppose Mr. Willie was, when he was examined here as a witness, to say, "I am guilty of treason." Or, suppose we were to put the question to him, and he was to use these words, even upon his oath—I will say, that even this could not be evidence against him. I have authority for this: that where a witness, on a trial for Treason, has a question of this nature put about himself, and he confesses the treasonable act, it cannot be brought against him, because it is not voluntarily made, but compelled by the process of the Court. Now, this would not be such a confession as though he were to come voluntarily into Court, because it is in answer to the Court.

I am really surprized, that a gentleman of Mr. Martin's extensive learning, had not adduced a single case which had touched that part of the point in question. All the authorities quoted, have been extraneous to the point, and not at all connected with it. Most of them relates to defamation, which very much differs. Turn to M'Nally, 256, and see whether he sustains his rule upon those principles. Did any of the books prove the attachment to the issue, where the prisoners were involved. The Earl of Shaftesbury's case, Oats's case, the Roman Catholic case, nor any of them, touched the crime of the prisoners; but, the decisions only went to their credit, that it should not be blasted by his own confession of extraneous crimes. The case of Christopher Love, for High Treason, 2 State Trials, 123, was quoted by Mr. Martin. Here every witness summoned against him was an accomplice, until this man, Jackson, came upon the carpet: And, what appeared to be his motive? The man refused to answer, and he was imprisoned. [Mr. Wirt read the case and arguments at length.] Now, Sir, the enquiry will come before you, whether he was imprisoned because he would not swear; or, whether it was not, because he refused to give evidence? It was not for the mere informality of not swearing. Would it not be frivolous to see a man bound to take an oath, and afterwards not be bound to give a single answer? This man would not be sworn, because it would be useless, as he was determined not to give evidence against the prisoner; and, he religiously would rather have suffered death, than to give his aid

towards the death of another, who he believed to be in a good cause.

I trust, Sir, that little need be said, to convince the Court of the important tendency of this letter; that they will order the man into Court; and, that they will make him answer the questions which we have suggested, as our desire to propound to him. Of what avail will this mysterious letter be to us, if we are prevented from the only means of knowing what it is? We want to send the letter up to the Grand Jury, as an article which, we consider, will strengthen the prosecution: And, surely, the Court will not interfere, to prevent justice being done, whether for, or against the accused! I am sure it will not. It cannot be contended, that it is of no use; although, to be sure, it is so in its present state. But, Sir, we do not want it to go, until we prove it to be the offspring of this very man—the prisoner. We want to give it the dignity of character it merits: we wish the whole transaction to appear: and, we trust, the Court will lend that aid, which their exalted situation affords, towards the developement of facts relating to the charge against the prisoner.

Mr. MARTIN. I rise, may it please your Honors, to make some observations on the arguments and authorities adduced by the gentleman last up. He begins by ridiculing the great number of law-points which we have produced—more than ever was known in any case. I can answer him, only by saying, that it well might be so; because, in the whole history of jurisprudence, there never was a cause carried on in the same manner; and, therefore, we are obliged to arm ourselves at all points. He says, they have a right to conduct the cause as they please. And, are we not to be prepared to meet it, with means in our hands, while all the means of government are against us; and, who have industriously searched all over the United States for witnesses against us? But, Sir, it is not a question of Col. Burr's proposing, that is now considering: it is the witness's own claim. He claims the exemption from answering to his injury, as his privilege—not respecting Mr. Burr at all: and, if he employs Counsel, it clearly shews, he is satisfied that there may be danger to himself. At one time, gentlemen think it extraordinary, that Mr. Burr's Counsel should take up the cause of this young man. They also think it extraordinary, because the man procures Counsel to save his own life! Now, we should think, that he has every reason in the world to employ Counsel, to warn him from impending dangers.

[Mr. M. here recurred to the case of Callender, where a witness claimed the privilege of Counsel, in order to prove, that it was a received doctrine in this Court, and by one of the gentlemen himself.]

The last gentleman has said much about accomplices being competent witnesses. He produced 2 Hawkins, 608. There can be no doubt of this, Sir. In every one of these cases, the parties came forward voluntarily to confess his own guilt, in order to shew

the guilt of the principal. And, the reason of such a principle in law, is evident; because, if it was not so, traitors would often escape. There is no doubt of every one of these volunteer accomplices, criminating himself; though, strictly speaking, he shall not suffer for it. But, says he, if the accomplice is a competent witness, should he not be examined as to the crime committed in which he himself was engaged? Yes, he should, because he has thrown himself upon his country. He comes forward to prove all the guilt, acknowledging his own: whereby his own criminality is greatly lessened, and no punishment is inflicted. It was said, that if an accomplice, being a competent witness, should be compelled to give evidence, he must shew himself privileged from conviction by law. Why, Sir, these are the very persons that are excepted from conviction. But, on any ground whatever, they are secured by that received maxim of the law—that "no man is obliged to answer such questions, as may convict himself."

Mr. WIRT explained. His position was, that accomplices are competent witnesses: but, it was not the confession that gave them the denomination of competent: it was their knowledge of the facts which formed the guilt; and, exception to them as evidence, was only made, where other testimony, which would go as far into the facts, was given.

Mr. MARTIN. I meant to state the gentleman's argument candidly. Sir, I lay it down as a sound principle of law, that if an accomplice confesses his guilt in Court, he cannot retract that confession. But, if that confession is made, even before witnesses, out of Court, he may deny it; and, he cannot be called upon as a witness against any other person, so as to convict himself. And, therefore, the only competent accomplice to give evidence, is a voluntary one; and, not one who is called upon, against his inclinations, to give testimony.

The case of Christopher Love, was introduced, and read at length by Mr. Wirt; but, I am at a loss to know what for, except it was to give a specimen of the coarseness of the language of those days, and the insults that were suffered to pervade a Court of Justice. All that I could make of the whole of it, was, that a man refused to swear, and that he was committed. But, the gentleman said, he was committed for not giving testimony. Be it what it may, there can be in that, no relation to this. But, certainly, the testimony of a witness, is what is always wanted; for, it can be no satisfaction, to see a man merely kiss the book.

In reference to a position laid down by Mr. Wirt, that, if Willie was to come forward, and confess treasons upon being questioned in Court, he could not be indicted, because it was a voluntary confession. Mr. Martin referred to Lord Audley's case, as similar. To be sure, he said, the Counsel on the other side, had provided themselves with two strings to their bow; and, as they flattered

themselves, with two stools to sit on; but, if they were not very careful, they would not get a seat in either.

I repeat to the gentlemen, that it is their business to shew, if they can, a single case where a witness has been asked a question, and the Court have called upon him to explain a single point of his evidence that would criminate himself. When gentlemen do advance such doctrines, we may with confidence demand authorities.

Mr. Martin then suggested to the Court, that as he had gone through with the law on the subject, and as it was past 4 o'clock, an adjournment would be acceptable; and, to-morrow morning, he should make a few observations in conclusion of his argument.

The Court adjourned accordingly.

WEDNESDAY, June 17, 1807.

Mr. HAY, at the opening of the Court, observed, that a great deal had been said about plundering of post-offices; and, it was expressly and strongly declared, that this letter had been taken improperly, if not feloniously, out of some post-office. This was evidently done, with a view to affect Gen. Wilkinson; and, at least to insinuate, that he was at the head of it. In order to afford some light upon this subject of conjecture, he would read a note, which he had this morning received upon the subject, as follows:—

"*Richmond, 17th June, 1807.*

"SIR,

"The letter addressed to Winburn, was delivered to me by Charles Patton, of the house of 'Meeker, Williamson and Patton,' New-Orleans; and, he informed me, was transmitted in the inclosed envelope."

"Respectfully, I am, Sir,
"Your obedient servant,
"JAMES WILKINSON."

"GEORGE HAY, Esq."

Mr. MARTIN proceeded. The question is, whether the witness is not the sole judge of what answers may criminate himself. I have endeavoured to shew the Court, that the law makes him the judge in this case; and, if it was not so, it would be nugatory to make a proposition that he is not bound to answer. The Attorney charged us with travelling out of the Court, in discussing the question; but, what was called travelling out of Court, irrelevency, &c. was as it respects this letter. I wish he had followed the idea he gave to us; for, directly, we find him saying, what effect this and that would have upon the public: and, the gentleman who spoke next, followed the same course—saying, that we were not aware of the effect that would be wrought upon the public mind, by our shrinking from the disclosure of this letter. Sir, was this meant as council to us? (kind, indulgent friend,) or, was it not

rather meant to impress upon the public mind, what they charged us to avoid, with there own inferences, in order to prevent my client from having a fair trial? Has he not been held up, through the medium of the news-papers, and in this Court, as a traitor to the United States? Has not a Court of Justice been denounced, for doing Juctice to his cause? Have not a Grand Jury, and a Petit Jury, been denounced? Has it not been proclaimed aloud, that if the Court of Justice should not fine and imprison him to the full extent of the law, (if a verdict should be found for misdemeanor), they would be marked? Have they not denounced the Attornies, and said they would be subject to popular derision, for taking up his cause? Have not all these things, and more, appeared in public prints? Indeed, they have already even convicted him; and, what for, but to prevent a fair trial, where more than his life—his fame—and his honour are at stake? Sir; does not the law, does not every principle of humanity, teach us, that we are not to denounce, but to presume him, as well as every other man to be innocent, until his guilt shall be made manifest through the proper organs of the law? Why, then, at this time, impress the public with his guilt? I allow, Sir, that the United States ought to get, by every fair and honourable means, all evidence they can: and, I admit also, that when a Grand Jury have found an indictment, it is the incumbent duty of the Attorney of the United States, when it comes before the Court and a Petit Jury, to enforce his guilt and criminality as much as he possibly can; and, to use all that zeal and talents, which he is so capable of. But, surely, in this stage of the business, ought he not to be governed by those principles of justice, which say—that, while guilt ought to be discovered and punished, innocence should obtain her claim? Would it not, Sir, be more conducive to the purposes of justice, that a guilty man should escape, than that an innocent man should suffer? The gentlemen have declared, that this letter is of material consequence to them. Now, upon its investigation, it must contain something criminal; or, if it does not, then it can be of no use; and, if it does, is there not a probability that this may be affected? If he knows what it is, therefore, he must be the best judge of the propriety of answering upon his own safety. Now, as to its relevency, of which we heard some remarks; and, among the rest, the presumption drawn, that it must be material, by our being so anxious to withhold it, I consider to be the most extraordinary argument ever produced before a Court! Here is a paper, not a single word of which is pretended to be understood by the Attorney; and, I am sure, it is not by us. We do not, and they say, they do not understand it—and, yet, we have been two or three days debating about it! Suppose, Sir, this letter had been altogether written in a foreign language, what would be the procedure in the case, then? Why, they must get it translated: And, by whom? I contend, that a Court of Justice cannot call upon a witness, under his oath as a witness, to decypher or trans-

late it. A translator must be sworn specially for that purpose: and, I know of no power upon earth, where a Court can compel a person to be sworn as a translator; but, any gentleman may do it if he pleases. Mr. Hay says, he believes Dr. Bollman can translate it. It may be so, or it may not, for what I know: But, this I know, that he cannot be compelled to do it.

The gentleman has contended for a distinction, in cases where a witness may, or may not be compelled to answer questions proposed by a Court. He has said, that, if the question proposed, is to the point in issue, then he may be compelled to answer; and if it is not really to the point in issue, he can refuse. But, Sir, I can tell them, there is no difference. Do they want authority? That was discussed in the impeachment of Judge Chase: and, we read in M'Nally, p. 2, that "no evidence ought to be admitted on any point, but to which the issue is joined." Peake, p. 3, has the same doctrine. It is a rule of the laws of evidence, that all evidence must be opened to the Court, that the Court may judge whether it is important to the issue; and, therefore, it is a necessary result, that, if it is not important to the issue, a person cannot be compelled to answer. In Hargrave's index, there is this doctrine laid down:—"A witness need not answer any question that does not tend to the issue: but, if the question does lead to the issue, and it would criminate the person if he were to answer, then he is not bound to answer, to criminate himself." Again: "A witness need not answer any question that *tends* to make him accuse himself, and subject himself to a penalty." Thus, we find, the very *tendency* may be a ground for refusal.

Mr. WIRT and Mr. HAY rose, to enquire where this case was?

Mr. MARTIN answered, "in Hargrave's index," which was a very luminous one; and, an authority which could not be denied. Mr. M. read largely the arguments in the case of Smith and Ogden, and the opinion of Judge Edwards upon the point; in which that gentleman said, that the witness was not obliged to answer any question that might *tend* to criminate himself. It was true, that the Court decided that Mr. Ogden was not obliged to answer; but, the doctrine contended for, is strongly marked as to the witness's competeney to judge. So in the case of Goosely, as reported by Mr. M'Caul, Judge Iredell expressed the same opinion. M'Nally, 258; and, Term Reports, 440, were referred to, to prove, that a man might be obliged to answer questions, which even might *tend* to hold him up to obliquy and reproach. I presume this must have been, where the man was called upon to give evidence; and, he was so suspicious a character, that his testimony was objected to. But the Court will find, that it is often the case; and, that, even when persons have received a pardon after conviction, they have refused to answer questions which would bring themselves into disgrace. See the Shaftesbury case. The rule of law is, that if a person had been convicted of a crime, the party making the charge as a cause of disqualification, must produce the record of judge-

ment in Court—[6 M'Nally, 216; and, 4 Term Reports, 440.] In the last is a case, where a man was proposed as a bail in the case of the King against Edwards. This man was asked, whether he had stood in the pillory for perjury. Now this was to defame him. He could not, however, for this, be refused as a bail; but, I presume, he was called upon to justify himself as to the sufficiency of his property. Now, to make a man look infamous, you must produce the record of judgement; and, it was upon this ground, that a man may otherwise refuse to answer. But the rule of law relating to questions asked of a person that has been punished for a crime, has been relaxed in England. Peake, 878, in the year 1791, has a case, where the rule is relaxed; because, a person who has been punished for a crime, cannot be brought into any injury by answering; but, where injury or punishment might follow, the law is clear in every case, to give the witness liberty to refuse. In Maryland, however, they abide by the old English rule, that witnesses should not be forced to answer to their own defamation.

I think, Sir, it now clearly proved, that this young man is not obliged to answer, if he thinks that it will tend to criminate himself. I shall now take some notice of the authorities that were produced by the Counsel concerned with me; and, of the effect that has been endeavoured to be produced by the opposite Counsel. In M'Nally, 256, the Attorney General said, (respecting a case), that the question could not be asked, because *it might* subject the man to some penalty. Again, Sir; in the St. Omer case, what could be more simple, and seemingly less tending to do harm, than to ask a witness how long he lived at St. Omer's; and, whether the house where he lodged, was not governed by Priests and Jesuits? But, we find that the Chief Justice said, that these questions could not be asked, because it might affect the witness. Now, this cannot, of itself, be understood. It must be considered as a link to the chain, each forming a part of the whole, and leading towards the end. The question to Ryan, was equally innocent in itself: "Do you follow any business?" A very simple question! But the Court, without having any knowledge whether it would affect him or not, gave him this caution:—"You need not answer the question, *if you think* it will criminate yourself."

But here, Sir, the witness is to be called, in order to inform the Court, *in what manner* it will criminate. So he is to expose the whole case; and say, how far he was concerned with Mr. Burr, in order to satisfy the Court, whether or not he ought to answer questions which have been already answered! We say, that he has a right to be sworn; and that, if upon oath, he shall say that he thinks himself interested, there ought to be an end to the business: except, that he may give evidence to every other fact where he will not endanger himself to punishment or trial. Why, Sir, I would ask, should he not be believed as much, when he declares himself interested, as he would be in giving evidence of the

facts, since both are upon oath? The law is so, as to civil property—[M'Nally 140.] A man may be asked, how he is interested in such a case. He may tell the Court, if he pleases, that he has such and such property in the case, according to the nature of the circumstance; and, that if he were to answer farther, it would tend to his injury. Well, there is an end of the questions. Then, Sir, if a man may refuse to answer when he is concerned in a civil case; how much more may he excuse himself, when his life or his liberty are at stake. Nay, Sir, I will go on farther, and say, that a witness upon his oath, thinking himself to be interested, although *in fact* he is not, will be sufficient for his refusal to answer such a question. And surely, no Court of Justice would expose the witness to perjury, by compelling him to answer.

The gentlemen elucidated their ideas by another case; which, I do think, as far as there is analogy, supports our principle. An Attorney at Law is called upon to give testimony—[M'Nally, 240.] What will a Court of Law do? They will say to him, I confess, that, if the circumstances of this fact came to his knowledge before he was an Attorney, or if not in the way of his profession, he would be bound to give evidence: it would be no privilege. But, does the Court enquire any thing farther? No, Sir: it rests entirely and solely, on the objection made by the Attorney to give evidence; who assigns, as the grounds of his refusal to answer, that his professional knowledge of the circumstances forbids him. And this rests on the oath and authority of the Attorney, in the same way, as credit must be given to other persons when on oath. Now, even if the Court thought it necessary to go into the examination, whether that knowledge of the circumstance in question, might come in any other way than under his professional secrecy or not, it would be impossible to acquire this explanation, without depriving him of the privilege which the law affords him in the same way, of refusing to explain. And, if he was to leave the Court, and go into a private disclosure with the Judges—by their order, the confidence placed in the Court, would necessarily remain a secret in their bosom; and, no farther light would be thrown upon it, than before. I shall turn to an authority, which gentlemen seem to rest on, in their favour, as conclusive—which is Marbury's case, 1 Cranch. I really thank them for having produced it; and should not, perhaps, have thought of it. But, if I have any knowledge of law, this is a most powerful evidence in our favour; and, nothing but a most unaccountable misunderstanding of its bearing, could have induced them to appreciate it. One gentleman acknowledged, that he did not approve of all the points decided in that case. Here they say, that the witness (Mr. Lincoln, who had acted as Secretary of State, and who was called upon to give testimony), might state his objections. To be sure, he might: we do not object to it. But, who do the Court attempt to make his judge in the case? No one. They tell him, "that if there is any thing which he should

consider to have been communicated to him in confidence, he was not bound to disclose it." They told him farther—"that he was not obliged to state any thing that would criminate himself." Who, Sir, is to judge of this? Not the Court. It stands with all other cases—*in his own opinion:* grounded upon his declarations made on oath, that such was his opinion.

Now, may it please your Honours, when I shew this strong authority, and when there is not the shadow of an authority on the other side, I must ask, upon what principles, or by what data they have formed their constructions upon what they have read or referred to? They certainly have rendered the law perfectly nugatory. Now, Sir, although we have produced argument and law, it seems to have no effect upon them. They have said, that much would be said by us, but it would not carry conviction to them. No, Sir; our arguments, as far as it respects them, cannot penetrate. They are like Ajax's shield, with seven fold of bull's hides round it, which rendered it impenetrable to the enemy. I should despair of having lungs enough to work conviction in minds so warped by prejudice, as I discover them to be.

This is the case, Sir. I have no doubt of your discovering the propriety of our observations. We can represent it as a case on which hangs property—life—reputation—and honour. In the name of these, we conjure you to reflect; which, we know, you will not fail to do; and, you will be convinced of our claim.

Mr. Wickham. May it please the Court. I hope to be excused, while I make a few remarks on this important subject now in discussion: Important, not as it respects this particular paper, because I really believe, so far as my knowledge of it extends, that it is of very little importance indeed; but, I do think the principle to be of magnitude, that is to be fixed by this decision. I consider, therefore, that it should be fixed upon strong legal grounds. What is the doctrine and principle contended for? To what lengths may the precedent extend? These are questions not unworthy of notice at this stage of the case. How many men Mr. Burr had with him, we do not know; but, we suppose there were a considerable number. We are told of some principle characters among them; and, with the rest, a Mr. Blannerhasset being connected with him. Well Sir, by and by, perhaps, we shall have Mr. Blannerhasset's letter; and, perhaps, that of every being who was concerned: and, according to the doctrine which we have heard, they must all be attended to. Witnesses will be called, in the manner this young man, who is not acquainted with our language, is now called upon, to be ordered by the Court to give testimony of facts, which may tend to their own conviction. Sir; it is in this point of view, and this only, that I view this letter to be of magnitude; for, I care not for its contents. I ask them, in this view of the case, (and no man can doubt that the principle established at one time, will operate at another, of the same nature), whether the gentleman ought to have talked so loudly about impres-

sion on the public mind? Have we not ground, strong ground to be in earnest about a subject which might, and will effect every similar point throughout the whole examination? Do they suppose that we are callous to setting *precedents*, as though of small consequence? They know perfectly well, that the whole of the analogous parts of this case will be governed by this decision, and that is not so trifling as they would fain make you believe. If these are facts, Sir, (which you must know that they are), why do our opponents sound so loud an alarm, as though we were contending for "trifles light as air"? I am little conversant with criminal proceedings, to be sure, and I wish to be much less acquainted with them; but I really am surprized, and think it very uncommon indeed, that when a man stands upon his trial on a criminal charge, and one of the highest magnitude which our laws know, the prosecutor talks about our trifling, and about affairs of party, and the like. I must own, that if all prosecutors conducted with the same zeal and severity, which we are doomed to experience from Mr. Hay, "trifles" may expand to an awful magnitude; which, however, small in their commencement, would be seriously felt ere they ceased. I have never, in my experience, even in civil law cases, known a man to be forced to communicate facts dangerous to himself, or injurious to his interest: and if such is the law and principle, it ought above all things to be adhered to in this case.

And what, Sir, must be the inevitable effect of such a course, as we have seen pursued? Will it not operate most direfully upon public prejudice? And if you excite public prejudice, you might as well at once condemn a man unheard.

But as to the merits of this, a witness, from the nature of the transactions, and from the relative connection of things, must necessarily be the judge, whether he will be implicated by any answers that he may make; and no other persons can, unless they first are enabled so to do, by receiving a disclosure of the very condemning facts; and the discovery thus made, is the very thing that is attempted to be avoided. Answers have been well given to all these things; and among the rest, it was justly said, that the witness would be upon oath; and if he would commit perjury, by declaring that he could not safely answer, he would in the examination: And, therefore, he could be believed as well in one case as another. The consequences of an initiating question has also been forcibly urged.

Gentlemen say, that our urgency is an admission of Mr. Burr's guilt. This we deny. It admits of nothing but what we all know; and that is, that Mr. Burr is under prosecution. We have heard something of the movements of Mr. Burr: we have heard something of what he has undergone from the iron hand of oppression: we now find him under a very heavy charge. This young man, it has been said, acted as his Secretary—travelled with him—and we may suppose was in his confidence. Now, we must not

be charged with shrinking from our declared opinion of the innocence of Mr. Burr, when (seeing Mr. Burr is arraigned), we apprehend the danger of his being arraigned also, from his intimate connection with Mr. Burr's intentions. We therefore wish to warn him, that he involve not himself in danger.

We are afraid of the exposure of these, and other similar facts, it is said. Sir, I will ask you, is there nothing to be apprehended by Mr. Burr, that after all his sufferings and persecution, there should be instituted a search of this nature; although he may be satisfied, that if the whole truth should come out, he will be discharged? Is he sure the naked truth will come out? Is there no danger from perjured witnesses? Many cases have occurred, and many more may happen, where an innocent man has suffered from perjured witnesses; who, from some base motive or other, have been enveigled to trifle with them. Then, Sir, in a prosecution like this, where the government stands as an individual, (God forbid, that I should say that the government would corrupt witnesses, or entice one to swear from truth: but, there are some men so base, as to think that it would be pleasing to the government, were they to give certain evidence in a certain case), then is there no danger? I still am anxious, lest something should unadvisably lead this young man into the most distant charge of guilt, however innocent.

Mr. WICKHAM then took some review of the case of Goosely and Reynolds. He represented the danger of a connection being at all proved between a man charged with a crime, and any other person; because, if the connection was once acknowledged, it would be difficult to prevent its discovery towards the source; which would subject him to the same prosecution, as the person was under, with whom he was connected: and, if no bill was sent up to the Grand Jury against him, he would owe it entirely to the forbearance of the Attorney. Now we will suppose the case of a man that is murdered. Any man is liable to be suspected of the deed. A question is asked, "where were you, such an evening?" Why no man would be obliged to answer, because his answer might render himself liable, from farther questions, to danger. So as it respects this letter: he either knows nothing about it, or the letter was written with his knowledge by Mr. Burr. Well then, is it not probable, that by some other evidence, he might prove a connection? This might possibly only effect his character; but if that be all, the question ought not to be answered, as has been well shewn by Mr. Martin, from M'Nally, and other authorities. Sir, I have no doubt, but in that country whence comes our law principles, which has been so violently stigmatized for constructions and made-up crimes, this young man would be there told, that he need not answer at all. The principle of law is certainly correct, which says, that it is not evidence, unless he comes voluntarily. The only reason, then, that a witness should swear in such a case is, that the secret should be locked up in his own bosom, if he pleases

not to disclose it, if it *tends* to find him guilty of any crime. And if so, he is certainly the judge of what he knows, and must exercise his judgement.

CHIEF JUSTICE. Is there any other question before the Court?

Mr. M'RAE requested a decision on Dr. Bollman's case, as he wished to interrogate him about the cyphered letter.

Mr. WILLIAMS was ready to go into the point.

Mr. BURR. There will arise some important questions, affecting the very sources of the jurisprudence of this country. I have several affidavits to produce, to shew, that improper means have been used to contaminate the public justice. When these proofs have been duly exhibited, it will be the province of the Court to decide, whether they will not lay their hands upon such evidence.

Mr. BOTTS. I rise to apprize the opposite Counsel, that there are three or four questions of considerable importance, which we shall bring forward as soon as possible. Two or three days ago, I commented upon the plunder of the post-offices; and, I assure the Counsel for the prosecution, that I shall probe that subject to the bottom; as no man can be more anxious than myself, that the odium which this transaction attaches to the inferior, or the superior officers of the government, should be wiped off. As a private citizen, or as Counsel for my client, I shall be sincerely pleased with a fit opportunity of retracting the expressions which I have employed. The Court will at once perceive the necessity of going into this enquiry at a very early period; for, if the officers of government have hitherto broken open letters from Col. Burr, they may hereafter resort to the very same expedient; and, by thus obstructing the very medium of communication, may prevent him from summoning witnesses, and preparing for his defence. One more remark. Yesterday I understood Mr. Hay, to charge us with having made certain insinuations against persons not actually named. He demanded why we had not forborne these charges, until we were prepared to support them. That remark, Sir, struck me with peculiar force. I was of the same opinion, that some proof ought to be produced. I immediately rose, and professed my wishes to go into an investigation of the case. But, Sir, little did I expect, that the gentleman would have proceeded to have justified these crimes. Little did I expect that such felonious transactions, should have been blazoned into mighty virtues; or, that it would have ever been maintained in this Court, that the person who had failed to plunder the post-offices, would have been guilty of a dereliction of their duty. I wish, Sir, to explore the post-office laws, to see whether they do not contain some provision, prohibiting the introduction of testimony, thus illegally obtained.

CHIEF JUSTICE. Unless these allegations affected some testimony that was about to be delivered, how can you introduce this subject?

At this time the Marshal entered; and, soon after, Mr. HAY informed the Court, that Col. Morgan was at that time before the

Grand Jury, and they had sent for a letter from A. Burr, to him. Should the letter (holding it in his hand), be sent to the Grand Jury?

Mr. Botts requested to see it. Here, said he, is a small piece of newspaper attached to it, which ought not to accompany it before the Grand Jury.

Mr. Burr. I have no objection that any of my letters should be sent up; but I trust, Sir, it will be seperated from this bit of a newspaper, and this comment which Mr. Morgan has attached to it.

The letter was handed to the Chief Justice; who observed, that the only use of the newspaper, was to shew, that at that time Col. Burr was at Pittsburg.

Mr. Hay said it was nothing more than to refresh his memory.

The Chief Justice decided, that it was right to dissever it from the letter: The newspaper itself was no evidence: But, if Col. Morgan would wish it to refresh his memory, there could be no objection.

They were accordingly separated, and then both of them were delivered into the hands of the Marshal.

Mr. Burr. The Court have very properly demanded some proof of the relevency of our proposition. Sir, we are ready to prove it: we are ready to prove it upon people on this very ground; and, we are ready name the post-offices, if the Court requires it, which have been thus plundered. When it comes out, that evidence has been thus improperly obtained, we shall say, Sir, that it is contaminated by fraud. I will name three persons who have been guilty of improper conduct in procuring evidence against me. These are—Judge Toulmin, of the Mississippi Territory; John G. Jackson, a member of Congress; and General Wilkinson. Two of these persons are within the reach of this Court; as well as the improper manner in which they have procured affidavits and witnesses against me. I mention these circumstances for two reasons: 1st—that the Court may take whatever steps they think fit to arrest this proceeding; and 2d—that they may understand the way, in which some of this evidence has been contaminated.

Chief Justice. Let the consequences be as they may, this Court cannot take cognizance of any act, which has not been committed within this district.

Mr. Hay. Let some specific motion be made, and the evidence produced; and, if there has been any crime committed, let the offenders be prosecuted according to law. These gentlemen know the course; and I most solemnly promise to discharge the duties of my office, whether they bear against Gen. Wilkinson himself, or the man at the Bar. If the crime had been committed, it is not the province of the Court to notice it, till after an indictment had been found.

Some desultory conversation here ensued; when Mr. Burr ob-

served, that he was afraid he was not sufficiently understood, from mingling two distinct questions together. As to the subject of the post-offices, it might rest for the present; but, as to the improper means employed in obtaining testimony, they were at this moment in actual operation. Some witnesses had been brought here by this practice; and, it was one, which ought immediately to be checked. He did not particularly level his observations against Gen. W. He did not say, that the Attorney for the United States ought to indict; or, that such a crime, if committed out of this district, was cognizable by the Court, unless it was going on while the Court itself was in session. In that case, an attachment would certainly lay.

Mr. WIRT. I do not yet understand the gentlemen. What is the object of their motion?

Mr. BOTTS. There is no motion: we shall hereafter make it: we have no other object by the present annunciation, then to give gentlemen a timely notice of our intentions.

Mr. BURR. We have sufficient evidence on which to found our motion.

What motion? demanded Mr. WIRT.

Mr. BURR. I thought, Sir, I had sufficiently explained my intentions. I may either move for a rule, to shew cause why an attachment should not issue against these persons; or, what is sometimes, though not so frequently practised, I may directly move for an attachment itself.

Mr. M'RAE. At whose motion?

Mr. BURR. At the public's.

Mr. M'RAE. A pretty proceeding indeed! that the public prosecution should thus be taken out of the hands of the public prosecutor!

Mr. BURR. A strange remark indeed! As if it was not the business of the prejudiced person himself to institute the complaint!

At this moment Mr. RANDOLPH entered the Court, and observed, that if he had been present, he would have himself opened this motion: which was intended to operate immediately upon Gen. W. but ultimately upon some other persons. Mr. R. here read the motion, which he would have submited to the Court.

Mr. HAY protested against this proceeding, which was calculated to interrupt the course of the prosecution, and was levelled at Gen. W. alone. Why these hints? Why these mysterious looks of terror, with which gentlemen come into this Court, as if they had something too horrible to be told? Mr. H. claimed from the Court, a priority for the business of the United States. Let the present prosecution be concluded, and gentlemen might then proceed with their investigation into the conduct of Gen. W.

Mr. RANDOLPH. The gentleman, Sir, will understand this subject much better to-morrow; but, as he asked for some intimation of our designs, I thought proper to accompany them with a few

remarks. And Sir, if this affair be really so stupendous, as I conceive it to be; if it be true, [Mr. HAY exclaimed that it was not], is it not entitled to the most serious enquiry? If this subject bears upon the present case—if it may influence the result of this trial—ought it to be suppressed? Your Honor will direct me when to come out; and, I assure your Honor, that I shall come out with an affidavit of one of the witnesses themselves.

Mr. MARTIN declared, that they would make their motions in the morning.

Mr. HAY expatiated at some length. He understood the object of this motion was to affect the materiality of Gen. W's testimony: and, in what way? He presumed that the Court would not notice the pretended transactions which had been alluded to, in any other way than as amounting to a contempt. As to any offence against the laws of the United States, the true course would be, to proceed in the way of a presentment. Now, what are the principles of the law of contempt, in relation to this subject? Gen. W. is said to have taken the depositions of certain persons in New-Orleans, and then to have brought them here by military force. This is the only ground of the contempt against this Court? But how can a contempt be committed? Either by directly insulting this Court—abusing its process—or interrupting its justice. Will it be said, that General W's. conduct comes under either of those discriptions? Gentlemen have very often thought proper to put words into our mouths; and, on one occasion, they have made us to say, that Gen. W. is "the pivot of the prosecution." And is it this very pivot which they are now attempting to break down by this precipitate application? Are the communications between the Court and the Grand Jury to be thus interrupted? Is their examination to be suspended, until Gen. W. has been put upon his trial? If these suspected transactions do amount to a contempt of this Court, it was not his business, officially to notice it. He should move to postpone the motion of gentlemen, until the prosecution was over, for several reasons: Because it would necessarily interrupt the business before the Court—because it was intended to impeach the credit of a witness—and because this enquiry could be as well conducted after, as before the prosecution.

Mr. M'RAE. I will affirm, Sir, in the presence of this Court and the surrounding people, that the charge now adduced against Gen. W. is completely unfounded. I affirm, that no witness has been brought from New-Orleans with an affidavit along with him, except one individual; who, refusing to obey the summons of the government, was regularly brought before a private Magistrate for his disobedience, and dealt with according to the due course of law; and, who is now in the custody of a person before this Court. All the rest came as good citizens ought to have come; and the only fault which can possibly be attributed to them, (if it be a fault), is, that they came in the United States' vessel in which Gen. W. was authorised to come.

Mr. WICKHAM. May I request the liberty, Sir, of making a few remarks upon Mr. Hay's motion? Col. Burr, Sir, brought forward his motion in the plainest possible style. There was no imputation; there was no attempt to excite the public feelings. He merely stated his object in the most general terms. The gentlemen, however, misunderstood him. They required a specification of our designs, and then we promised to satisfy them to-morrow. They still insited upon a more particular explanation of our points, and Mr. Randolph did rise to gratify them. Nothing, however, seems to please those gentlemen. They not only found fault with the motion, but the face of Mr. Randolph. He will scarcely, however, change his face to please them. It is precisely such a one as GOD ALMIGHTY gave him.

Mr. Hay, Sir, has got into parliamentary habits, and talks very fluently of the previous motion. On this subject, I will make but one remark. The Constitution had divided the powers of the government among these great departments—the Legislative, Executive and Judiciary. These must be kept separate and distinct, not only in their duties, but in their practice. The Legislature act upon convenience—the Judiciary act upon right. The gentleman, however, seems to think himself suddenly transported to the Legislative hall; and, no doubt, would soon think it very convenient to hang Col. Burr. He tramples all our judiciary forms under foot: if we make a motion before the Court, he soon trips up ours with his previous motion. And where is his doctrine to end? We certainly have the same rights as the gentlemen themselves; and, as they have moved the previous question, we will move, Sir, that the Court shall not hear their motion. It is better that we send these parliamentary distinctions to the other side of the house, where they ought forever to remain.

Mr. Hay says, that this motion ought not to be made *pendente lite*. Sir, Col. Burr ought to have the same justice meted out to him, which is meted to every other person. He stands here on the same footing, and with the same privileges as any other citizen in his situation. I assert, that any other man would have a right to this attachment; and, that the motion may be made *pendente lite*, though it is sometimes made afterwards. "Why does he make it at this time? Why does he not postpone it till after the prosecution?" Why, Sir, when Col. Burr is discharged, (and I hope he will shortly be so), he may not be disposed to trouble the Court any farther. How long this prosecution will last, no one knows: perhaps a week—perhaps longer: it is already gone so far beyond our expectations, it is impossible to conjecture. Now, Sir, may not similar contempts occur? Is it not necessary to restrain certain people, by convincing them that such practices make them liable to punishment?

But what has Gen. W. done? He has brought witnesses with him from New-Orleans by military force. He has taken their

depositions, too, entirely *ex-parte*, for the purpose of keeping their testimony straight. I lay down this broad position: that the man who goes about collecting affidavits, a volume of which we have already seen at this Bar—[Mr. HAY interrupted him, by asking whether they came from New-Orleans?—To which Mr. Wickham replied: I did not say New-Orleans: I might have particularly mentioned Mr. Jackson, who comes here with the depositions of witnesses, thus bound hand and foot. Sir, I saw them in this very Court, examining witnesses with affidavits in their hands, and comparing the one with the other: depositions taken not by commission, but *ex-parte*;]—when an interested agent thus goes about collecting depositions; and, with ignorant men, shaping them as he pleases—I avow that they are contrary to the spirit and genius of our government; that they are a contempt upon this Court, by interfering with the purposes of justice. Such men are liable to an attachment, from the very moment when this government took possession of Col. Burr's person: not from the moment of his arrest by Mr. Perkins and Lieut. Gaines, but from the moment when Mr. Perkins received orders to conduct his prisoner to this city. Do not gentlemen recollect any instance of libels upon the Courts, when they were actually in session? Such have taken place on this side of the ocean, as well as on the other; though not so frequently in Virginia, where printing-presses are not so numerous, nor so extravagent in the license which they assume. I repeat, that whosoever does any act which influences the administration of justice, is liable to an attachment.

Mr. WICKHAM hoped, that the Court would hear this motion to-morrow.

The CHIEF JUSTICE observed, that if the practice could be shewn to affect the decision of the Jury while they were in session, the Court could not refuse to hear the motion.

Mr. HAY. Whenever it is brought on, I shall renew my motion to suspend this enquiry, until the prosecution shall be finished.

THURSDAY, June 18.

As soon as the Court assembled, the CHIEF JUSTICE delivered the following OPINION in the case of Willie:—

In point of law, the question now before the Court, relates to the witness himself. The Attorney for the United States offers a paper in cypher, which he supposes to have proceeded from a person against whom he has preferred an indictment for High Treason, and another for a Misdemeanor, both of which are now before the Grand Jury; and produces a person, said to be the Secretary or Clerk of the accused, who is supposed either to have copied this paper by his directions, or to be able to prove in some other manner that it has proceeded from his authority. To a question demanding, whether he understands this paper, the witness has declined giving an answer—saying, that the answer might criminate himself; and, it is referred to the Court to decide, whether the excuse he has offer-

ed, be sufficient to prevent his answering the question which has been propounded to him.

It is a settled maxim of law, that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares, that every person is compellable to bear testimony in a Court of Justice. For the witness, who considers himself as being within this exception, it is alledged that he is, and from the nature of things must be, the sole judge of the effect of his answer: That he is consequently at liberty to refuse to answer any question, if he will say upon his oath, that his answer to that question might criminate himself.

When this opinion was first suggested, the Court conceived the principle laid down at the Bar to be too broad; and, therefore, required authorities in support of it might be adduced. Authorities have been adduced, and have been considered. In all of them, the Court could perceive, that an answer to the question propounded, might criminate the witness; and, he was informed, that he was at liberty to refuse an answer. These cases do not appear to the Court to support the principle laid down by the Counsel for the witness, in the full latitude in which they have stated it. There is no *dictum* which takes from the Court the right to consider and decide, whether any direct answer to the particular question propounded, could be reasonably supposed to affect the witness. There are many questions, no direct answer to which could, in any degree, affect him; and, there is no case, which goes so far as to say, that he is not bound to answer such questions. The case of Goosley, in this Court, is, perhaps, the strongest that has been adduced. But, the general doctrine of the Judge in that case, must have referred to the circumstances which shewed the answer might criminate him.

When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principles by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent; and, according to the true intention of the rule, and of the exception to that rule, by observing that course which it is conceived Courts have generally observed.

It is this:

When a question is propounded, it belongs to the Court to consider and to decide, whether any direct answer to it, can implicate the witness. If this be decided in the negative, then he may answer it, without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The Court cannot participate with him in this judgement, because they cannot decide on the effect of his answer, without knowing what it would be; and,

a disclosure of that fact to the judges, would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this state of things, that if the question be of such a description, that an answer to it may, or may not criminate the witness, according to the purport of that answer—it must rest with himself, who alone can tell what it would be, to answer the question or not. If in such a case, he says upon his oath, that his answer would criminate himself, the Court can demand no other testimony of the fact. If the declaration be untrue, it is in consequence and in law, as much a perjury, as if he had declared any other untruth upon his oath; as it is one of those cases, in which the rule of law must be abandoned, or the oath of the witness be received.

The Counsel for the United States have also laid down this rule according to their understanding of it; but, they appear to the Court, to have made it as much too narrow, as the Counsel for the witness have made it too broad. According to their statement, a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthlesss. Many links frequently compose that chain of testimony, which is necessary to convict an individual of a crime. It appears to the Court, to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself.

It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself; and, to every effectual purpose, accuse himself as entirely as he would do, by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but, all other facts without it, would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares, that no man is compellable to accuse himself, would most obviously be infringed, by compelling a witness to disclose a fact of this description.

What testimony may be possessed, or is attainable against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer, which discloses a fact, that would form a necessary and essential part of a crime, which is punishable by the laws.

To apply this reasoning to the particular case under consideration: To know, and to conceal the Treason of another, is misprision of Treason, and is punishable by law. No witness, therefore, is compellable by law, to disclose a fact, which would form a necessary and essential part of the crime. If the letter in question contains evidence of Treason, which is a fact not dependent on the testimony of the witness before the Court, and therefore may be proved without the aid of his testimony; and if the witness was acquainted with that Treason, when the letter

was written, he may probably be guilty of misprision of Treason; and, therefore, the Court ought not to compel him to answer any question, the answer to which might disclose his former knowledge of the contents of that letter.

But if the letter should relate to the misdemeanor, and not to the treason, the Court is not apprized that a knowledge and concealment of the misdemeanor, would expose the witness to any prosecution whatever. On this account, the Court was first disposed to enquire, whether the letter could be decyphered, in order to determine from its contents, how far the witness could be examined respecting it. The Court were inclined to this course, from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it was put in cypher, or when it was copied by himself, if indeed such was the fact. But on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cypher, it appears to the Court, that the question may be answered without implicating the witness; because, his present knowledge would not, it is believed, in a criminal prosecution, justify the inference, that his knowledge was at acquired previous to this trial, or afford the means of proving that fact.

The Court is, therefore, of opinion, that the witness may answer all the question now propounded.

The gentlemen of the Bar will understand the rule laid down by the Court, to be this:—

It is the province of the Court to judge, whether any direct answer to the question, which may be proposed, will furnish evidence against the witness.

If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction.

In such a case, the witness must himself judge, what his answer will be; and, if he says on oath, that he cannot answer without accusing himself, he cannot be compelled to answer.

Mr. WILLIAMS (Counsel for Mr. Willie) stated, that he had misunderstood him the other day in Court; but, in a subsequent conversation, had obtained more accurate information. He does understand a part of that letter.

Mr. HAY requested that Mr. Willie should be called into Court. When he appeared, Mr. H. interrogated him:—

Do you understand the contents of that letter?

Mr. WILLIE. A part of it.

Mr. HAY. Was this letter written by the hand, or the direction of Aaron Burr?

Mr. WICKHAM objected to the question.

CHIEF JUSTICE. The witness and his Counsel will consult.

Mr. HAY repeated the question.

Mr. WILLIE. Yes.

Mr. HAY. Which? By his hand, or his direction?

Mr. WILLIE. By his direction. It was copied from a paper written by himself.

Mr. HAY. I wish this paper to be carried to the Grand Jury. I presume there can be no objection.

Mr. BOTTS. No objection! We call upon you to shew the materiality of that letter.

Mr. HAY. I deny the necessity of any such thing. Until this letter is decyphered, it will be perfectly unintelligible to me and to the Grand Jury. It is no more than a blank piece of paper.

Mr. WICKHAM. I had always understood before, that the testimony which is laid before a Grand Jury, must not only be legal in itself, but proved to be material.

Mr. WILLIAMS begged leave to interrupt the gentleman. Mr. Willie is anxious to be particularly understood. He says, that this decyphered letter was first written by col. Burr, and afterwards copied: But, it is the cypher only, which has been copied from col. Burr's original.

Mr. HAY. It is quite sufficient, Sir. If col. B. wrote the cyphered part, he will be considered as the author of the whole.

Mr. WICKHAM. The gentleman has started a curious proposition indeed! I had always understood, before, that the whole included the part; but, it seems now, that the part is to comprehend the whole.

Mr. HAY. The remark of the gentleman may be good wit, Sir; but, he certainly knows, that it is not law.

CHIEF JUSTICE. Can you get this letter decyphered?

Mr. HAY. Is Erick Bollman in Court? I wish him to be called. These gentlemen demand proof of the materiality of this letter. Is this a question about which the Court will interfere? Can the Court think it proper to require the materiality of this cyphered letter, before it is sent up to the Grand Jury? We may turn the very favourite argument of gentlemen against themselves. This letter is either material to the present case, or it is not. If it be material, how can they object to its production? And, if it be perfectly immaterial, what injurious consequences can result from its being sent up to the Grand Jury?

Mr. BOTTS. I never supposed, that it could be a question, whether an immaterial paper could be exhibited before the Grand Jury. This question has frequently been decided in the negative. On the trial of Smith and Ogden, Judge Patterson solemnly decided against such a proceeding. Were papers permitted to be laid before a Grand or Petit Jury, before their materiality was proved, it would produce an endless confusion, and waste of time. In Washington's Reports, there is a case, where the Court of Appeals inferred error, because an inferior Court had permitted the introduction of an immaterial paper: and, this too, was in a civil case. Even if the Grand Jury have called for it, it ought not to be sent up

them, before its materiality has been shewn to the satisfaction of the Court.

Mr. M'Rae. Would it not be as proper, Sir, to compel every witness, before he is sent up to the Grand Jury, to state the substance of his testimony, as it is to require proof of the materiality of a paper? This enquiry, however, is never made. The only qualification which is required about a witness, is, that he should be a legal, competent witness—not that he should be sworn to be a material one. The very same principle is applicable to this paper. After it is proved to be a material testimony, is it necessary that an enquiry should be made into its materiality? In fact, how can any such proof be given, when the letter itself is principally in cyphers?

Mr. Wickham. Mr. M'Rae has demanded authorities: I have prepared none at present, Sir, because I could not have supposed that any were necessary. As to his argument, that no enquiry is to be made into the materiality of a paper, because none is made into that of a witness, it has no application. When a witness is sent up before a Grand Jury, it is presumed that his testimony is relevant to the case. The only question is, is he a competent witness? and, it is only on the ground of competency, that his testimony is not legal. If competent, he is a legal witness; he is sworn; and is forced to answer such questions as may be put to him by the Grand Jury. If, however, he refuses, they then call upon the Court to interpose its jurisdiction; and the enquiry will then be, whether the question is a material and proper one? As to papers, they are not to be received at all, unless they are shewn to be relevant to the case. And where is the limit to this species of proceeding? Suppose, in this search after papers, all the private letters of col. Burr should be brought up; all the most secret actions of his life should be written down: will the Court indulge them in such a wide inquisition?

The Chief Justice said, he had in some measure anticipated this question, and had reflected upon it. His opinion was this: A paper to go before the Grand or Petit Jury, must be relevant to the case, even if its materiality were not proved. Why send this letter before the Grand Jury, if it cannot be decyhered? If it can be decyphered before the Grand Jury, why not before the Court? Let it then be decyphered, and its relevancy may at once be established.

Mr. Hay. Is there no difference between any other paper, and a cyphered letter proved to have been originally written by Aaron Burr?

Chief Justice. Still this letter may not be relevant to the present case.

Mr. Hay then directed Erick Bollman to be called into Court, that he might be interrogated, as to its contents. He requested that the Court would indulge him for a short time, until he could

execute some important business before the Court of Appeals. The Court accordingly suspended the prosecution.

At half after one, the Court again resumed the business; but neither Dr. Bollman, nor Mr. Hay, made their appearance.

A few minutes after the Court had resumed its business, Mr. J. Randolph entered, at the head of the Grand Jury. He addressed the Court:—

May it please the Court. One of the witnesses under examination before the Grand Jury, has answered certain questions touching a letter in cyphers. The Grand Jury understand that this letter is in the possession of the Court, or of the Counsel for the prosecution. They have thought proper, to appear before you, to know whether the letter referred to by the witness, is in the possession of the Court.

The CHIEF JUSTICE observed, that as the letter was wanting to establish its identity, it was a relevant paper. It would, of course, be delivered to the Grand Jury.

Mr. M'RAE hoped, that before the Grand Jury retired, they would be informed, that a witness had proved that this letter was originally written by Aaron Burr.

Mr. WICKHAM. And I hope, they will also be informed, that the superscription on that letter has not been proved to have been written by col. Burr.

The Grand Jury then retired, and the Court adjourned till to-morrow 11 o'clock.

FRIDAY, June 19.

As soon as the Court met, Mr. BURR addressed it. He stated, that the Express that he had sent on to Wasington, with the subpœna *Duces Tecum*, had returned to this city on Wednesday last; but, had received *no* other than a verbal reply from the President of the United States, that the papers wanted, would not be sent by him: from which I have inferred, said Mr. Burr, that he intends to send them in some other way. I did not mention this circumstance yesterday to the Court, under an expectation, that the last night's mail might give us further intelligence on the subject. I now rise to give notice, that unless I receive a satifactory intimation on this subject before the meeting of the Court, I shall to morrow move the Court to enforce its process.

The CHIEF JUSTICE handed down to the Bar, a copy of a letter addressed from Dr. Erick Bollman to the Grand Jury.

It was not publicly read; and, for that reason, Mr. HAY declared, that he should not make any remarks upon it. Its contents have not yet transpired.

Mr. BURR's COUNSEL called up James Knox and Charles Lindsley, (two of the witnesses for the United States), who had drawn up depositions, on which it was intended to ground the attachment against Gen. Wilkinson.

Mr. HAY interrupted the motion, by stating, that he himself had

a motion to make to the Court; and, that was, for leave to send up such written interrogatories to the Grand Jury, as he thought proper to be put to certain witnesses. His reason was, that some of the witnesses would voluntarily depose to as little as possible; that the Grand Jury might not always know the particular questions to be proposed to them respectively, and to what point to shape their enquiries; that he himself better knew what they would say, (having seen their depositions); and that his interrogatories might probably aid the Jury in their investigation.

Mr. MARTIN. I shall object to this motion, unless it is qualified. We cannot send up our own witnesses to the Jury, but we may send up our interrogatories. We will assent to the motion of the Attorney for the United States, upon the condition that he will assent to ours.

Some conversation ensued upon the motion for an attachment—when the CHIEF JUSTICE asked, if the papers could not be put into his hands, and the argument takes place to-morrow. He wished to consider the question before it was discussed.

Mr. HAY approved of this course: it would prevent the public exhibition of these affidavits, which were drawn up for the sole purpose of defaming Gen. Wilkinson. He would say nothing about the quarter, or the persons from whom they came; or the deadly hatred which they had conceived against him: that he had merely glanced his eye at a single expression in one of these papers, which was as impudent a falsehood as ever malignity had uttered. The Court might compare these papers with the law, and determine whether they would justify an attachment or a rule.

Mr. E. RANDOLPH spoke at considerable length. He was disposed to postpone this subject till tomorrow; but, from the moment when he heard Mr. Hay's anticipating speech, he was opposed to all delay. He had produced documents to support his motion; and, yet, according to Mr. Hay, it was dictated by nothing more than the policy to defame Gen. W. Mr. Hay had wandered into the very error which he had charged to us. He had called upon the Court to defend the character of Gen. W. the defender of his country, who is come through the firey furnace purer than gold; and, yet, he has himself charged the witnesses now before the Court, with malignity and rancour.

Mr. BOTTS. Why do gentlemen object to the present motion being heard, when they have so often insisted upon their own right to be heard by the Court? Why do they reproach us with shrinking from the evidence, when they are now attempting to screen their favourite witness (Gen. W.) from a fair investigation of evidence? Does Mr. Hay desire, that the character of these men should be immolated to this saviour of his country? The Constitution has recognized the equality of man. Though these gentlemen may not be tricked out in the tinsel of military pomp—their rights as citizens, and the respect due to their characters, are the same with those of any other man.

Mr. M'RAE expatiated at some length, on the impropriety of animadverting, at this time, upon the character of Gen. Wilkinson. The Court had already said, that no step should be taken, which would affect the justice of the case; and it was, therefore, much better for the Court to pursue the suggestion which they had thrown out, (to examine the papers in private, and see whether the affidavits were relevant to the point), than to prejudice the justice of the case, by a public exhibition of these affidavits.

Mr. WICKHAM protested against the secret tribunal to which gentlemen wished to resort, for stifling enquiry, and murdering character. The gentlemen who have made these affidavits, are upon their oaths. Is it right for the United States' Counsel to charge them with perjury?

Mr. HAY denied having made any such assertion. He had merely alluded to one expression in their affidavits, which was too monstrous to be believed. But why all this feeling on the present occasion, when gentlemen have so often charged Gen. W. with perjury?

Mr. MARTIN. When did we charge him with any other perjury, than that of violating the Constitution, which he had sworn to support? Is not this notorious? Are not Swartwout and others here to prove it? We did not say that Gen. W. was ready to perjure himself; but, merely, that he had every thing now at stake, and would go almost all lengths to hang col. Burr.

After some other discussion, Mr. BURR argeed to place the papers into the hands of the Court, and to wave his motion till to-morrow.

CHIEF JUSTICE. Reduce the motion to writing.

Mr. BURR. It is only upon the affidavits of Knox and Lindsley, to move for a rule to shew cause why an attachment should not issue against Gen. Wilkinson.

Mr. MARTIN hoped, that as col. Burr had postponed his motion, the Attorney for the United States would postpone their's.

Mr. HAY refused, upon the ground, that the witnesses now were before the Grand Jury, and that his interrogatories would be necessary to direct their enquiries.

Mr. BURR. I instructed my Counsel to consent to this motion, upon the condition, that I should also be permitted to send counter-interrogatories.

Mr. HAY did not feel himself at liberty to acquiesce in such a proposition: He would rather trust to the distinguished intelligence of the Grand Jury.

Some conversation ensued upon the form of the motion relative to the attachment. The Attornies for the United States, insisted upon a specification of the conduct for which it was to issue. Why not insert that it was to be for a "contempt of the Court;" why not particularize the very circumstances in Gen. W's life, which constuted this contempt.

Mr. BURR said, that the specification was to be found in the two affidavits; and, that it was from delicacy to gentlemen, he had

not attempted to make these affidavits matter of record, by introducing them upon the face of the motion.

The motion was at length amended, by introducing words to the following *effect:* "For a contempt, in obstructing the administration of the justice of this Court."

Mr. HAY said, that it was obviously right and just, that Gen. W. ought to be here: the testimony of the witnesses might be disproved, and their credit tested in a way, that in his absence might not be done. He wished the whole story to be told at once, and that nothing should appear *ex-parte* to impress the public mind wrongly. The statement made in these papers, (the affidavits), he considered to be extremely incorrect. How far the oral testimony would be so, he could not say; but, it certainly was of consequence to the character of Gen. W. to be able to detect it at the moment, before it went abroad in a false shape; which could not be done, if commenced in his absence: for, it was not probable, that it could be concluded this day. What real necessity there could be for this *partial* examination, he could not tell; but, its effect was easily calculable; for, whether the gentleman intended it or not, it certainly would impair the credit of a gentleman who would be a material witness on the pending trial. Now it is evident, that the examination should not proceed, without the strongest reason in the world; and, such a reason cannot be produced. Besides, on the postponement from Saturday, the Court did not positively say when it should proceed; but, that it should proceed to-day, if Gen. W. was at liberty to attend. There is no necessity, nor justice, in hurrying on a partial proceeding.

Judge MARSHAL. The Court is not desirous of taking such a measure. But, however, the just mode can be pointed out. Being in possession of the affidavit, could not the Counsel, for the United States communicate with Gen. W. some time to-day, or to-morrow morning, and receive from him some interrogatories, to put to the witnesses? If this be done, and even Gen. W. is not able to attend here to-morrow, the Court will leave the case open, and not discharge the witnesses until he can attend, when he might cross-examine. I do not see, however, as to the main object, that there is any *real necessity* at all for the attendance of Gen. W. but, to accommodate both sides as much as possible, we desire that nothing should transpire, without his being present. If Gen. W. should shew, what was stated the other day—that all the measures with respect to the United States' witnesses was by civil authority, it must have its weight: and, he can do it, without being here himself. The examination is postponed till to-morrow.

TUESDAY, June 23, 1807.

Gen. Wilkinson appeared in Court, seated with the Counsel for the prosecution.

Mr. BURR rose, and observed, that as Gen. W. was now in

Court, they would, with permission of the Court, pursue the enquiry. But, he begged leave to make one previous remark, which was: that if, in the course of the enquiry, the charge should not be directly carried home to him; and, that if Mr. Gaines, or any other person, should have any objection to answer questions which might be put to them—the Court may consider, how far they were under the orders of Gen. W. in what they have done, which might otherwise implicate them. We shall not confine ourselves only to the testimony of witnesses; but, with permission of the Court, shall call for papers. Now, as this is the only precise manner of procuring a knowledge of facts, whether it might tend to render others culpable or not, we shall think ourselves entitled to them.

Mr. HAY. That is a question in which Gen. Wilkinson alone is concerned. The motion is for a rule against him. He, therefore, is the only person against whom testimony can bear. I shall certainly object to the introduction, but what has that direct tendency; and, I hope that the Court will distinguish the case in that view, and suffer no extraneous testimony to be offered. If other persons have committed any thing that is wrong, and which subjects them to the notice of the Court, let them be proceeded against in the way that the accused has thought proper to proceed against Gen. W. [illegible] ject is, not to screen any guilt, but to restrict the whole of [illegible] relates to this motion, to Gen. W. identically: and, if he has been [illegible] of any obstruction of the process of this Court, or of any thi[illegible] which can be denominated a contempt, let the Court say [illegible] fact, the accused has but an inch of ground to tread upo[illegible] and there he wants to extend himself further, than I trust the Court will permit him.

Mr. MARTIN. The gentleman need not fear: there can be no doubt but the Court will stop us, if we introduce any thing which was not done by Gen. W. or by his orders, either real or strongly implied.

Mr. E. RANDOLPH. There is no necessity to admonish us; for, when we go wrong, the Court will tell us so. Mr. Burr very properly anticipated the necessity of specific papers. We shall consider ourselves at liberty to speak of other persons, who are directly under the authority of Gen. Wilkinson, as freely as himself; without, however, intimating any thing but their submission to his orders, and of his consequent guilt. I am happy that the position has been postponed till Gen. Wilkinson appeared in Court; because, as far as I am personally concerned, I wish all the criticisms that his conduct will undergo, or any connected with him, whether subordinate or not, to be heard by him, and by them.

This, then, is the charge that I bring against Gen. Wilkinson to this Court: That he, in conjunction with others, did wilfully and unlawfully cause compulsory process to be served upon James Knox and Chandler Lindsley, whilst in the city of New-Orleans; whence they were transported by water to the city of Richmond, to

give testimony for the United States in the case of Aaron Burr; the effect of which unlawful measures was directly and essentially tending to obstruct the free course of testimony, and of the administration of justice in this Court, and to invade the privileges of witnesses.

Mr. M'Rae. The motion was reduced to writing the other day. What has now been read by Mr. Randolph, appears to me to be very different.

Mr. E. Randolph. There was no entry made of that paper. Such being the case, I presume that we have a right to accomodate our charge to circumstances. It is the same in substance—growing out of the same facts.

Mr. Hay wanted to know the course meant to be pursued.

Mr. E. Randolph. Just the course which I am taking, and which has been directed by the Court: and it is unquestionably right. We shall prove, Sir, that this James Knox was served by some person with a subpœna in his hand, in behalf of the United States, to attend the Federal Court here on the 22d of May: This occurred at New-Orleans, about the 12th of May.—That he declared his willingness to come.—That, although, he was then destitute of means to bring him; yet he expected in a very short time to receive some money.—That some time after this, he was taken by the Sheriff, and carried before a man by the name of Hall, who appeared in some judicial character.—That the said Knox was informed, that he was brought upon the affidavit of Gen. Wilkinson: That he might either give his affidavit; or, as an alternative, he must go to Richmond.—That he declared his willingness so to do. That this Judge, (if he be a Judge), as the fact will shew, was acting under the influence of Gen. W. in this business. The man was for that time bailed to appear at 11 o'clock the next day before the same Judge, without the least allegation or specification of any crime.—That he did then appear, when he was pressed again with a number of questions.—That finding he should be eternally harrassed by them, as he already had been, he thought it most advisable to give his whole history to them for a considerable time back; and, therefore, he supposed himself to be safe. But, he was mistaken in this: for, while this examination was going on, this man calling himself a Judge, gave a note to a military man, who took him into custody. The terms of his release was, to give security in (I think) 500, or 1000 dollars: which he, not being able to do, was carried away to prison: not as an offender, but as a witness forsooth! Bail was attempted to be procured; but, it could not be done. Farther.—That after having been some days in jail, a Mr. Dunbaugh, acting as a military man, and under the authority of Gen. Wilkinson, took him out, and conveyed him safely on board the Revenge, a vessel belonging to the United States, and then in commission.—That he was forbidden to go on shore, although he had every reason to desire it, as all his clothes were on shore.—That this vessel, although not under the immedi-

ate command of Gen. W. as a Navy officer; yet was, with all the persons on board, under his entire controul.—That under the same controul he came within the waters of his own country, where he was discharged to attend the trial.

This is the testimony of Mr. Knox. That of Chandler Lindsley is of the same nature respecting himself. Several others were in a similar situation: but these will prove the tyrannical nature of the action. The only difference between this case and Knox's, is—that Lindsley, making a merit of necessity, and knowing he was to be otherwise dragged on board, as he had been to prison, went on board of his own accord.

James Knox was then sworn.

[To avoid interrupting the narration, we here introduce an application to the Court by the Grand Jury.]

Mr. J. RANDOLPH. May it please the Court. The Grand Jury have understood, from one of the witnesses before them, that there is in the possession of the Attorney of the United States, a statement in writing, made by another of the witnesses: which, the Grand Jury are of opinion, might probably tend to throw light on the subject before them. They have appeared in Court, to make application for that statement.

Mr. HAY said, that the paper intended, was a statement of transactions made to him in writing, and in confidence, by Dr. Bollman. When it was made, it was upon the express promise that no use whatever should be made of it, that would operate against himself. The situation of Dr. Bollman was such, at this time, as to forbid a paper of the kind passing out of his hand. The Court had not decided, whether he was to be considered as a pardoned man, or not. Not knowing the extent of the President's pardon, he could not say, whether, at any rate, it would be justifiable to deliver the communication. He wished not to criminate him, nor to injure his reputation, if he had any. When the Court should have decided as to the pardon, he should then be at liberty to make use of any papers that would not be injurious to the man.

Mr. BURR suggested the propriety, in order to facilitate the proceeding, of now taking up the question of *pardon*. It would be then seen, whether Dr. Bollman was to be considered as a pardoned man, against his will; and how far the compulsion of his producing evidence or papers, would operate.

Mr. MARTIN was surprized that any communication held by the Attorney, should be refused to be delivered to the Grand Jury, when they had applied for it. He trusted that the Court would direct him to deliver it to them.

Mr. HAY. I do not mean that this paper shall even go to the Grand Jury: private confidence forbids it.

Mr. BURR's COUNSEL were urgent that it should be produced.

The COURT asked whether the paper was in the hand-writing of the witness, (Dr. Bollman)?

Mr. HAY said, that he did not know any thing about the hand-

writing of Dr. Bollman: he had no acquaintance with his writing; but, he could not submit this paper to the Grand Jury, without it was first ascertained, whether or not Dr. Bollman was considered as a pardoned man.

Mr. MARTIN expressed his surprize, how this paper came to the knowledge of the Grand Jury; and how its importance should strike that body so forcibly, since the Attorney had so strenuously insisted upon its secrecy.

Mr. WICKHAM. There is another circumstance—which is, that the Attorney appears to be ignorant of whose hand-writing it is in. Now this could be ascertained in a moment, since the person himself is in Court.

Mr. M'RAE said, he should have no objection to gratify the gentleman; but, that whilst the question of pardon was undecided, its operation might be injurious to the party. If it went to the Grand Jury, consequences must rest with the Counsel.

Mr. BURR and Mr. BOTTS expressed their willingness to meet the result—but, on Mr. HAY's objecting to give it up, a message was sent in writing by the Court, containing a refusal of the paper.

The COURT next proceeded to the examination of witnesses in the charge exhibited against Gen. Wilkinson upon the motion of attachment, for contempt of Court, &c.

Mr. BURR to JAMES KNOX. Relate to the Court the manner in which, and by whom, you were first taken in New-Orleans.

KNOX. I went to New-Orleans, sometime in March last. I was there about a week, when I received a note from Gen. W. that he wished to see me.

Mr. BURR. Was any cause assigned?

Mr. HAY wished the witness to be left to relate his own story in his own way.

Some conversation ensued, as to the propriety of interrogation, and as to the state of the motion.

The COURT said, that it was proper to state the specific interrogatories, since it was intended to take the evidence in writing; but, it would be necessary that they should go to the point of the case.

The WITNESS proceeded. Accordingly, I went to Gen. W. He told me the purport of his note was, to make some enquiry respecting Sergeant Dunbaugh. He addressed me very handsomely; took me by the hand; and asked me if I was not afraid to call to see him, seeing the manner in which he had used some people. I told him, that I was not afraid. He asked me, if I would relate to him what I knew. He told me I was at liberty. He asked me if I was not a free-mason. He began to note down what I said to him; but, I stopped him, and told him that it was not my wish to have it taken down. He expressed great uneasiness, and complained of the trouble I gave him. He continued asking me questions, and writing them down; but, I again stopped him, because he did not write the purport of what I said. He asked me to relate the manner in which I came to New-Orleans, and respecting

the distress the men were put to in going down the river. He asked me if I received any pay? I told him I had not. Did I not expect some? I answered that I should, if I called for it. He asked to what amount? I said about 100, or 150 dollars. He then said, suppose he was to relieve me, by giving me what I wanted, would I then give my testimony with more freedom? I told him that I wanted to go home: that I should be home in about two or three weeks, and I could do without it. He asked me if there was any service whatever that he could render me, as he would do it.

Mr. BURR. Who served the subpœna on you? WITNESS. Capt. Gaines. He said, that we should have but about ten or twelve days to go round.

Mr. BURR. Was this not about the 10th or 12th of May? WITNESS. It was about the 12th, I reccollect, from the time mentioned which we should have to go round.

Mr. BURR. Was there any conversation passed about going round? WITNESS. Yes: I told him that it was not my wish at that time to go.

Was you afterwards taken up? Yes.

How long afterwards? I think in about four days.

Who took you? The Sheriff. When I was sitting down to supper, he came, and took me away to Judge Hall's office, who asked me to give in my deposition. I must either do this, he said, or go round. I told him that I had no Counsel there; that I might commit myself, perhaps.

Relate some of the circumstances before you were examined.

WITNESS. I was taken to the Governor; and, he thought proper to take my word, to appear the next day before the Judge, which I did; and, after being there till about 12 or 1 o'clock, the Sheriff asked me if I expected I could get bail for my appearance the next day. I told him I expected I could from some of the gentlemen with whom I lodged. I did so, and we then entered into bond for 500 dollars until next day. I went then to Judge Hall's, who shewed me a number of printed interrogatories.

Mr. BURR. Printed ones? WITNESS. Printed ones. I had the liberty to read them. The Judge asked me if I could answer them? I told him that I could not answer a number of them, if I were disposed. I had no Counsel; but, if they would allow me, I would get one in two hours. There was a lawyer who came in, and who told me, that he had no right whatever to ask me those questions.

Mr. HAY said, he was very unwilling to interrupt the the evidence; but, he did not know what this long story, and conversation with, and about Judge Hall, &c. had to do with Gen. W.—for, surely, he was not responsible for acts about which he had no knowlege. He suggested the propriety of confining the witness to a narration of what passed in his knowlege with Gen. W. whose conduct alone the motion before the Court went to scrutinize.

Mr. BURR. There can be no doubt of confining every witness to the immediate subject before the Court. The relation now giving is so: it will presently be made appear from it, that the finger of Gen. W. was in every part of it. We shall shew, that by this species of collusion and policy, he carried his object into effect; and, that when Mr. Knox got to jail, as well as in every subsequent situation, he was in effect under the orders of Gen. W.

Mr. HAY. Gen. W. wishes the witness to go on.

WITNESS. The Lawyer told me, that the Judge had no right to ask me such questions. However, he still persisted in asking from the printed paper: some of which I answered: At last, I told him I would save him the trouble, as I would tell him the whole from starting, until I arived at New-Orleans. He turned round to Mr Fort, who was brought there in the same way, who said that he would not give answers to the interrogatories. He then wrote an order, and sent us to jail, puting us into a yard where there were about 50 negroes; and we had to find our way from there as well as we could. Mr. Fort gave bail, and got out. I asked what bail was necessary for me to give? He told me, either 500, or 1000 dollars, I forget which. I thought then, I might as well stay, and go round in the vessel, not being in a situation to give that bail. I staid in jail three days. I spoke to Sergeant Dunbaugh, who came to release me to go on board the vessel, if I could go and get my clothes first: but, I could not get them. Afterwards there came a soldier. I asked him if he was a guard? he said not. He has told me since, however, that he did not want to wound my feelings, for that I was under guard. I went on board the Revenge, when I asked immediately for Capt. Gaines. They told he was not on board. I did not see him until about an hour before we sailed.

Mr. BURR. Relate what passed between yourself and Dunbaugh while in jail. WITNESS. I asked him if he was a guard. He told me that he was a soldier, and that he wanted to come along with me in company; and, he did come down to the water with me to go on board. While I was in jail, I wrote by him to Chandler Lindsley, and Dr. Mulhollan, to come and see me about my clothes.

Were you at liberty after you got on board? I went on board that night that I got out of jail. I requested Sergeant Dunbaugh to let Capt. Gaines know that I wanted to see him, and told him the purpose was to get my clothes. Capt. Gaines, when he first saw him, said I was in a bad humour. I told him I certainly was, and had good reason to be so. He told me to say no more about it. I asked him to go on shore. He answered, that it was not in his power: that it was only in the power of Gen. Wilkinson.

And did you not have your clothes? No, Sir: I had only what I had on at the time. I sent up to Chandler Lindsley, and he brought me one of his shirts. Capt. Gaines afterwards told me, he had 40 dollars for me. I told him that I had no occasion for

it; but, that I wanted to go to my lodging, and get my clothes; that I owed 40 or 50 dollars there, and I wanted to settle my bill. I paid 20, and still owed some, which I have sent back.

When you arrived at Norfolk, were you at liberty? When we arrived at Hampton, Capt. Gaines came to me, and asked me if I had any objection to go up? I told him that I never had the least objection to go: that he might take me up if he pleased. He told me that I was sent round under the authority of Judge Hall. I told him that I did not know by what authority, but that he might send me any-where that he pleased. Gen. Wilkinson came to me the next day, and asked me if Capt. Gaines had been with me. I told him I had been very ill used, in being sent round as I was, without any money or clothes. He said, that this was the first he had heard of it. He asked me if I would go up. I answered, that he might send me where he pleased. He proposed to let me go on my parole of honour. I told him, that I had been very ill used: that I had requested many favours from Capt. Gaines, though it was much against my disposition to request a favour from any man. I think he told me, that if I wanted 50 dollars, I could have it. I told him, I did not want the money, but I wanted my clothes. He afterwards called me on the quarter-deck, and said I might have 50 dollars. I told him, I supposed that sum might be enough to get as many clothes as I wanted; and, I had to take it.

How did you come to Richmond, by land or by water? By water: I came on board of a pilot-boat. The Pilot told me, that he was to take charge of Gen. Wilkinson's passengers to Richmond, to wait his orders at this place.

Mr. WIRT cross-examined the witness. Have you not a military commission from Pennsylvania? No.

Have you no military commission at all? No.

Where is your place of birth? In the State of Maryland, near Chester.

When did you leave that country? When I was very small.

Have you lived in Pennsylvania? Yes. I cannot say that I ever lived out of Pennsylvania.

When were you in Pennsylvana last, or when did you leave it? I got into Virginia, just about the beginning of December last.

You removed from Pennsylvania, not expecting to return? Not with that expectation.

What time did you leave Pennsylvania, on your trip to New-Orleans? About the 4th or 5th of November.

Did you go alone?

Mr. MARTIN objected to this question, as not relating to the subject-matter before the Court.

Mr. WIRT. We will shew the subject-matter presently.

Some conversation occurred between Messers Martin, Burr, and Wirt, as to the tendency of such questions, and their possible consequence.

Mr. WIRT said, that he did by no means wish the witness to

speak any thing that would criminate himself; but, as this subject was of the first importance to Gen. Wilkinson, it was right to sift the narration; so as, if possible, to impeach the credit of the witness from his own mouth.

The WITNESS said, he should have no objection for every thing to be known: he could wish even the conversation he had held with Gen. Wilkinson to be read, if it could be come at rightly. The General had taken a part of it down; but, the manner of his taking it down, made it appear erroneous; and, therefore, if it was read, he should wish Gen. W. to state the answers he had given. [He related a part of the conversation held.]

Mr. WIRT, When did you leave Meadville? WITNESS. On the 25th of November.

Did you go alone down the Alleghany? No: there were seven or eight others.

When did you leave Beaver? Soon after.

Had you any additional company? Yes.

How many? About 20 or 30.

Did you stop any where? Yes.

Where? We stopped a day or two at Blannerhasset's Island.

When you went away from there, did any additional men go with you? Only Mr. Blannerhasset himself; and, I believe, one other.

Where did you stop next? I do not recollect; but, at a number of places along the river.

Above or below Fort Massac? Above.

Did you meet with any additional company there? Yes.

What number of men were there? I do not know that I ever heard; but, perhaps, about double, or not quite that number.

From Tawney-town, where did you proceed? To Comberland Island.

Did you make any halt there? About a day and a half.

How far is that from the mouth of Cumberland? Just opposite.

Did you meet col. Burr there? Yes: He was at the mouth of Cumberland.

How many men were there in your party then? About 60 or 80; or, there might have been more.

Was the whole party there? I do not know.

How many boats were there? About 7 or 8.

Were there any arms? I believe there were five guns, and one rifle.

Were the boats loaded entirely with men? Men and provisions.

Where did you go then? To Fort Massac.

Did you get any additional men there? One: Sergeant Dunbaugh.

Did he bring any arms with him? Yes: a gun and a rifle.

Did you see any boxes about, or attached to the boats, which might have contained arms? No, Sir.

After your junction with col. Burr, did you consider yourself as moving with him, and under his direction? I believe I did.

Did you go on in Mr. Burr's company, or did he leave you? No: he left us; and the boats proceeded without him, I imagine.

How did you get to New-Orleans? In one of the boats that was laden by a gentleman with cotton.

What became of the boats? Some were sold, and some were freighted.

By whom? By one Hill.

Was he of your party? Yes.

My particular object is, to ascertain, whether in the whole, you consider yourself under the direction of col. Burr? When I left home, I did not know that I should see Mr. Burr at all: Comfort Tyler was the person with whom I first began the expedition.

Did you perceive any difference in point of authority? I did not know Mr. Burr, until I got to Cumberland. How I got the information; I know not, whether from Mr. Tyler, or not; but, it was generally considered, that Mr. Burr was the principal man.

Did you see no boxes let down into the water from the bottom of the boats? No.

When did you get to Orleans? About the 13th or 14th of March.

Did Gen. Wilkinson solicit an interview with you? Yes: he wrote me a note.

He made some enquiries about your descending the river, did he? Yes.

Did you state the facts according to the questions asked? Yes, I did.

Did Gen. W. compel you to answer these questions? He pressed me very much: he asked me if I was at liberty to reveal it. I told him I was, but I did not want to be detained as an evidence.

Did he use any kind of threats, like compelling you to answer? Quite the contrary: he offered me money, and used me with great civility.

Was this 150 dollars offered to you, do you suppose, for the purpose of making you tell? It was my impression that he did expect from this offer of money, I should tell more.

What: the whole truth? No: not the whole truth.

You heard no more of Gen. Wilkinson afterwards? No, Sir: He pressed me to call again, and offered to serve me.

Then you had no further interview with him, until you saw him on board? I recollect seeing him once afterwards.

Well, the first notice you afterwards had of Gen, W. was, when summoned before Judge Hall: Mr. Gaines told you, that you were summoned under an affidavit from Gen. Wilkinson? Yes.

Did you not suppose that the information you gave Gen. W. was of sufficient importance, to cause him to make that affidavit? I did not make my answers to him, as though I had been on oath; and, I did not think my answers of such importance.

The information you received at Judge Hall's, was, that you were supposed to be a material witness? Yes.

Did the Judge ask you many questions relating to the case? Yes.

Did you refuse to answer them? I answered some.

Did you refuse to any? Why, I told him that I did not like to answer: I begged leave to have Counsel.

Did Judge Hall recognize you to come round here as a witness? No, he did not. When I was taken before him, he had a number of printed interrogatories.

Did not you refuse to answer? No.

Was there no offer of bail made? Not at that time: Before that, he asked Mr. Fort and myself, if we could find bail; but this was only for appearance on the next day.

Your recognizance was discharged by your appearance the next day, then? Yes.

Well: was recognizance required of you to come round here to give evidence? I do not recollect that it was.

It was by the order of Judge Hall that you were committed? Yes.

Who relieved you from jail? Sergeant Dunbaugh took me out, and carried me on board the Revenge.

Were there any offers made to you, to bring your clothes on board: the clothes which you say you left behind? Not in that way, Sir. Capt. Gaines, when I told him of my wish to get some clothes and papers out of my trunk, and told him I had no sea-stores, appeared to be much in a hurry. He told me, that if I would write a note, he would endeavour to get my clothes, and would provide me some sea-stores. I wrote to him after he was on shore, but was refused the liberty of sending the letter: the officer told me, that none of the men could go with it. In three quarters of an hour after this, Capt. Gaines came on board with Gen. Wilkinson.

Did you state to Gen. W. that you had been debarred going after, or sending for your clothes? No: The vessel sailed in three quarters of an hour.

Where was it, you first mentioned those circumstances to Gen. Wilkinson? In Hampton Roads.

How were you used—like the rest of the passengers on board the vessel? I was treated as well as some, worse than others, and better than others.

You were not distinguished, then, by any particular treatment? No, Sir; I made no complaint; I could bear hardships as well as others.

What time did you get to Richmond? On Friday last.

Where did you put up? At the Bell Tavern.

Had you any interviews with any of your former acquaintances? I went down to the Ship.

How long was it after that, you saw col. Burr? Three days. I saw Mr. Moxley going in one day: I wanted to go in after him; but, I then went away, and did not go for two days afterwards.

Then you did attempt to see him the first day? No: it was about two days: it was Sunday or Monday.

Did you receive any message from him in the mean time? No: but that, through Mr. Moxley, col. Burr had made enquiry who came round; and said, he should be willing to see them all in good health.

What induced you to take this affidavit: Did you enter into conversation with Mr. Burr? It was from my treatment at New-Orleans.

Was it voluntary on your part? Some of the gentlemen may recollect that I was going to make the motion then, and I spoke to them about it; but, it was doubted whether, from the usage I had formerly got, I might not again be sent to jail, or put under guard.

Did Mr. Burr take any notice of your communication respecting treatment? No: but Mr. Botts did.

I understand you to say, that you had not refused to answer the questions put to you by the Judge, and that you were willing to come on? Yes, Sir; I was willing.

State what you know respecting taking any person on board the wherry at————, and who it was that you took on board? It was col. Burr.

Where did you carry him to? I do not know the name of the place.

Did you hear of a col. Browen thereabout? I heard of him; but, I did not see him.

Did you carry col. Burr to the place belonging to col. Browen? No, Sir.

Where did you carry him to? I parted with him in the woods.

Were you not with him afterwards? I was with him, and my comrades, two or three days at the Natchez, and after we left there.

Do you recollect any thing of an address made to your comrades, as to the leave Mr. Burr was about to take of them? No: I did not hear him make any address.

Had you never seen Gen. Wilkinson before he sent you this note? Not to speak to him.

No communication with him? No, Sir. Dunbaugh wished me to come there several times. I said I would as soon see him, as any other person. I received a note from Gen. Wilkinson.

What did you do with that note? I believe I tore it up afterwards.

Where? In New-Orleans.

What was the purport of it? It related to something concerning Dunbaugh.

Was it sealed, or open? It was sealed, left at my lodgings, and was there two or three hours before I came.

What became of the men in the boats after you left there? Some of them were in the boats, and some were at Natchez.

You left Mr. Burr in the woods? Yes,

What time was it? It was dark.

Did you not afterwards go for his baggage? No.

Did you not afterwards carry his baggage any where? We took up his baggage afterwards to the house.

What house was that? I do not know.

Was it not Browen's house? I heard that it was.

Were you charged with any letters from that house? No.

Had you not letters for Floyd and Tyler? No.

Mr. BURR questioned the witness. What was the reason of stopping there?

WITNESS. It was on account of the want of wind, and from the severity of the weather. I am sure we could not have gone on, I know that it was so cold, that my hands were nearly frozen.

How many guns were there in the whole? Six or seven rifles, and one shot-gun.

Had you, at any other time, any other guns; or were there any more whilst you were on board? Not that I know of.

How long was it before the vessel sailed, that Gen. Wilkinson came on board? Not above half an hour.

Mr. BAKER. When Gen. Wilkinson offered you this 100 or 150 dollars, was there nothing in the offer like the appearance of a bribe? Yes: I considered it in that way. He asked me what I had to expect money from? I told him from Mr. Tyler. He asked me, then, if I would have some money, and give my testimony? I did not expect such a favour from him: he was uncommonly kind.

COURT. Was you with Gen. W. before or after the summons was served? WITNESS. Before.

You said that you had a claim upon Comfort Tyler: how much was it for? I said that I should have had as much from him, as would have carried me home at any time I should choose to quit.

Mr. HAY. Did you, or did you not, in the course of your dialogue with Gen. Wilkinson, speak of your complaint against Comfort Tyler, and wish you had redress on account of the deception? I did state it.

Did not Gen. W. state that he wished you to come round to Richmond? No. Sir. He told me that it was possible I might be called some day or other, with some others.

What time was this? In March.

And was it then he offered you money? Yes.

And do you think it was meant to excite you to tell all you knew? It appeared so.

Who commanded the vessel you came in? One Moxley, a Midshipman. He told us that we were all under his care; that Gen. W. had given him the command of her.

Did you consider that you were brought his prisoner to Richmond? Yes, Sir.

Did you leave the vessel before you came to Richmond Yes: about ten or twelve miles from it.

Who was with you? Sergeant Dunbaugh. I came up in that way, for the purpose of getting myself some clothes.

Then you come of your own accord? Yes.

Mr. BURR. Did you ask Dunbaugh to come with you? No, Sir.

When did Mr. Moxley get his command as Midshipman. I believe at Natchez: I heard so.

Mr. M'RAE. Did you, or not, go with Mr. Floyd and Mr. R. to Natchez? They were in the boat.

And you were in the boat with them? Yes.

What was your business? I do not know: only to go down to that place, and stop until the others came.

Was there a particular confidence in you, and did you not go there for a particular purpose? No.

How long was it before Mr. Burr arrived after you got there? I do not know: perhaps two or three weeks.

Did you not meet with some of the people about Natchez, and converse with them very freely as to your going down the river? I boarded with three or four people in a house, and we conversed together.

Did you not sound their feelings? No, Sir; they were some there, who appeared very friendly.

What were the people's thoughts of the party generally? Why some were well disposed, and some otherwise.

Were you there, when the military were ordered out; and how did you act then? Yes: and I went down.

Did you not actually join them against your own party? No.

Had you not one of your men under guard one night? No.

Who commanded your party? I do not know that there was any difference; we were all alike.

Mr. BURR. What became of the property that was in the boats: did the military take it out? Yes, Sir; they took it out, it was sold, and some of the boats were torn up. They took some hoes and some axes out, and sold them.

Then you had some carpenter's tools? Yes, Sir.

Mr. M'RAE. Were there not some of the boats that had boxes in them? No.

Where did you take in the cargo of hoes and axes? I do not know: it was somewhere down the river: it was a purchase made by Mr. Burr.

Mr. BURR. We shall call no other evidence.

Mr. HAY then called Capt. Gaines, as a witness in the defence, who was sworn.

Mr. HAY, to Capt. GAINES. Please, Sir, to inform the Court, what you know in relation to Mr. Knox, or of any of the circumstances of the case now under consideration.

Capt. GAINES. Here is a letter from the Attorney General of the United States, inclosing several subpœnas, which I was requested to serve. I received them on the 29th April last. [He give them to Mr. Hay, who, upon application, shewed them to Mr. Wickham.] I reached New-Orleans on the 7th of May. As soon as I could find where the persons named to me were, I called upon them. I called several times at the house where I understood Mr. Knox, Mr. Lindsley, and Mr. Mulhollan lodged; but, I could not find them; for, when I came near, they used to slip out the back way, under the impression, as the landlord told me, of my having something against them; or some precept, which they did not like me to serve. I shewed to the landlord what my business was; assured him, that I had nothing against them; and requested him to tell them, to call where I staid. When I saw them, I read to them the subpœnas, and they explained to me the reason why they kept out of the way. They said that they had belonged to Mr. Burr's party, and they did not wish to appear against him. I think it was Mr. Knox, and Mr. Lindsley, said this. I informed them, that the Commander in Chief had authorized me to offer them a passage on board one of the public vessels, and that they would be apprized of the time when it would sail. I desired them to let me know whether they could come in that way, that preparation might be made for them. Mr. Lindsley seemed disposed to come on without difficulty. Mr. Knox refused to answer: He said, he had first to make some arrangements respecting money; upon which I told Judge Hall, that Knox had not informed me whether he would come or not. He desired me to apply to him again. He then informed me that he could not come so soon as the vessel would be ready to sail; upon which I stated to Judge Hall, that he had refused to come, until he had received his money; and enquired, what measures were necessary to be taken. He informed me, that some person had filed an affidavit, stating the materiality of his evidence; upon which, he would take measnres to have him taken. I enquired of the Judge, whether it was necessary for me to do any thing further, or not. He said there was not; but, that a civil officer of the country, would serve a precept upon him, and have him recognized to appear at the trial. On the next day, or perhaps the same day, I went to Judge Hall's, and informed him, that the Marshal had left a deputation for me to take charge of Knox, and to bring him to Richmond; (having first asked me whether I would act, which I consented to do, as I was going). I consented to act under the deputation. Judge Hall told me, that if I did not think proper to keep charge of him myself, any other person with me could do it at my direction. Upon

this, a short time before the vessel sailed, I directed Seageant Dunbaugh (giving him a written order), to go to the prison, and to receive in charge the person of Knox, and to convey him on board of the vessel.

Judge MARSHAL. I understood that you acted as Deputy Marshal, and were to convey him yourself.

Capt. GAINES. No, Sir: I enquired whether it was necessary for me to attend to him at all times, and to remove him myself; The Judge told me no; I could send another person to remove him; and, therefore, I sent Dunbaugh. After the vessel was nearly ready to sail, Mr. Knox seemed to be in a very ill humour; as, indeed, he always appeared to have been. I asked him what he wanted, or what was the cause of his complaint. He said he wanted a number of things, and some clothing out of his trunk. I had obtained from the military agent of New-Orleans, forty dollars, to advance to him on account; and I asked him, whether he would accept of it. He hesitated awhile. At last he accepted it, and gave me a receipt. In reply to my enquiries whether he wanted any kind of assistance, he replied that he wished to go on shore himself. I told him that as the vessel was about to sail, it could not be granted; but, if he would name any friend to get any thing for him, it could be sent to him. I gave him paper, and desired him to write. He hesitated, until I found it necessary for me to leave the vessel on business I had in the city again. I staid about an hour: and, when I returned, he still appeared very sulky. In a short time the vessel sailed; and, I believe, he was not under any restraint from that time, until we came to Hampton.

Mr. HAY. By whose orders did you act? I shewed the subpœna under the direction of the Attorney General. In every stage afterwards, I acted under the authority of the Marshal of New-Orleans, except it was as to the offer of a passage on board of a public vessel, and that was done by the order of General Wilkinson. I understood afterwards, that the vessel was obtained by him, or his order. I heard that some of the witnesses were disposed to come in the stage, for which no arrangement was made respecting him; and, I distrusted him, that if he should come on shore, I could not be sure to procure his appearance. I understood afterwards, that they would all come together in the vessel, except a few, who staid to take passage in the stage.

Did you see any thing like ill treatment of Mr. Knox, while on board? I did not. I believe that the witnesses, Knox, Lindsley, and Mulhollon, fared as well as some of the officers on board: To be sure, they did not stay in the cabbin.

Were you with this witness, (Knox), before Judge Hall, at New-Orleans? No.

You do not know, then, for what the Judge made the order for his commitment? I do not, to my own knowledge. If I understood right, Gen. Wilkinson had no controul over him.

He was under your controul then, and not under Gen. Wilkin-

son's? Yes. From the time he was commited to your custody, under whose care was he? I considered him as under mine.

Did you consider him under your care in your military capacity, or as a Deputy of the Marshal? I did not consider him in my charge as a military officer; because, I had received no orders as a military officer respecting him; but, as a Deputy Marshal, I considered him under my charge.

Did Gen. Wilkinson, in your presence, attempt to exercise any sort of authority, or constraint, over that man? No, Sir: never in my presence.

Cross-examination by Mr. BURR. You say, that you received orders from the Attorney General: where were you then? Capt. GAINES. I was at Fort Stoddart.

How did you get that letter? I received a letter of request on the subject.

Where is that letter? [It was produced.]

Have you the deputation of the Marshal as his deputy? [It was also produced: as was also the order of Dominic A. Hall, (Judge), directing the witness to be brought to Richmond.]

COURT, at the suggestion of Mr. BOTTS. Had you the instructions of the Department of War on the subject? WITNESS. I had; and they purported, that I should attend to the instructions of the Attorney General of the United States.

Mr. WICKHAM. Where are they? Mr. HAY. Here they are, [and produced them.]

Mr. BURR. What day was it you received those instructions, do you know? I do not, Sir.

Had you any previous conversation with Gen. Wilkinson? I have informed the Court, that I had no knowledge of it, until given to me by Judge Hall; nor had I any knowledge of my deputation, until it came. It was not of my procuring.

Did you give any deputation to Sergeant Dunbaugh, who took charge of Mr. Knox? I gave him an order to go and take James Knox from prison, and safely to deliver him on board the vessel: [He produced the order, and read it.] I had previously asked the keeper of the jail, if a receipt would be necessary for his delivery. He told me, that the order would be sufficient: And accordingly Dunbaugh went, and took the man out.

Mr. BURR. Is he, (Dunbaugh), a Sergeant in the army? I understood he was. I never knew him as such.

Mr. BAKER. Did not Dunbaugh act in his military capacity, as a Sergeant?—Did you not think him bound to act agreeably to your orders, you being his superior officer? Not in his military capacity. I found Dunbaugh, and sent him upon that business: calling him Sergeant.

Did you consider any citizen of New-Orleans bound to obey your orders? When he should refuse to obey them, I did.

Did you consider him as bound? When he said he would, I did.

Is not a Sergeant bound to obey his superior officer?—and, do you not suppose he obeyed you as a military officer? I had heard that he was a Sergeant: but, I never knew him as such.

Mr. WICKHAM. Did you take an oath of office, when you received this deputation? No, Sir.

Have you received any emolument for it? No, Sir.

Have you ever been promised any? No.

Did you say, that you gave the subpœnas to Gen. Wilkinson? I did give them to him.

Had you any conversation with Gen. W. on the subject of summoning Knox? Yes: there was some.

Did he direct you to summon him? I informed him of my authority, but I do not particularly recollect as to any direction.

Did he not wish you to do it? I think he recommended it.

When Mr. Knox was found to be in a sullen mood, had you any conversation with Gen. W. on the subject? I had no direct communication on it, as I know of at present.

Did you consult with Gen. W. as to the orders? No, Sir: I stated to him what were my powers.

How came the subpœnas out of Gen. Wilkinson's hands into yours: were there any orders given at the time? No: none.

What passed between you and Gen. W. on the subject? I do not recollect. I think it probable, that nothing did pass on that subject. I suppose that the General imagined me to understand my instructions from the Attorney General, which he saw me to possess.

Were you present when Gen. Wilkinson took the affidavit? Yes.

Where was it made? In his own quarters.

Who administered it to him? Mr. Cenas.

What did Gen. W. do with this affidavit? I do not know.

We wish you to recollect? [Hesitated.] I cannot recollect whether I delivered it to the Judge, or not.

Do you recollect, whether you went from the General to the Judge? I do not think I did; because my impression was, that I received my authority from the Attorney General of the United States.

Did you not deliver something to the Judge? I delivered a letter.

Had you any advice, orders, or instructions from Gen. Wilkinson concerning something of Knox, or going before a Magistrate, or any thing? I do not recollect any thing. He consulted with the Attorney, as I did also several times, on the subject of the subpœnas, and advised me what steps it was necessary to take.

Who directed, or advised you to go to the Attorney? No person.

Did you retain the Attorney? No: I applied to the Attorney on the subject of the subpœnas, but not particularly relating to the

case of Knox. I also mentioned the case to another Attorney two or three times; as I did not know the different distributions of powers in the United States, or how far I could go in the office of which I had accepted.

Did you, before you came to New-Orleans, consider yourself bound to obey the orders of Gen. Wilkinson as a military officer? Certainly.

Well, Sir, you went on board the public vessel. Suppose he should have there ordered you, to put one of these men in irons: would you have done it? I should have thought that he possessed the power of controuling me, and every other person in the Army or Navy that was on board: but I did not think that he possessed a disposition so to do.

Do you know, whether Gen. Wilkinson knew of these men being put on board the vessel? I have no doubt but what he knew of it.

Was there a Midshipman there, or any other officer who was a prisoner? I understood that he was under arrest.

Did you stop at any place in coming from New-Orleans? Yes: we called in at Havanna a short time. Several of us were very unwell; we had no fruits on board; and had no other water, than the Mississippi river water; and, therefore, we put into Havanna to get some supply: but, whilst we were making arrangements to get out our boats, there came a shot from the Moro Castle as a signal for us to come in: This was about 4 o'clock. After supplying ourselves, a little after dark, we set sail again.

By whose direction, or orders, was it that you put in there? It was at the request of those who were sick; who, by a note, requested it of Gen. Wilkinson, and of Capt. Reed, the master of the vessel.

How long were you coming round? From the 22nd of May, I think, until the 17th of June.

What provision was made for the fare of those that were coming? I do not know.

Had they no particular sea-stores provided for them? I do not know that they had; but, I know, that the sea-stores were much better than the other provisions.

Questioned by Mr. HAY. You say, that you had received several subpœnas; some of which were intended to be delivered to Gen. Wilkinson: who returned some of them to you, pointing out some particular witnesses? Yes: he pointed out some of them.

Did you consult Counsel as to that, and as to the deposition? Yes: at several different times, I recieved advice with respect to several points relating to the subpœnas; but, on what particular points, I do not know at present.

Did Gen. Wilkinson refer you to any person who would give you that advice? He named a Mr. Gurney, the Attorney of the District; and a Mr. Duncan.

Did you receive advice from them? Yes: on several occasions.

By Mr. RANDOLPH. You speak of 40 dollars given to Mr. Knox: upon what authority was that money paid to him? WITNESS. There were several applications made to me for this purpose. I mentioned the circumstance to the Governor, to General Wilkinson, and to several other gentlemen. I think the General advised me to consult Judge Hall upon the subject, or the Attorney General: but I went to Judge Hall. He was asked by Mr. Graham, whether I was right in advancing money? He approved of it; and said, that I had a right to demand its remuneration. I was afterwards informed by the military agent, that he had been authorized, by Gen. Wilkinson, to advance this money.

Mr. BAKER. Then I understand that Gen. W. first consulted with the Attorney, and then advanced, or ordered you to be advanced the money? I do not know as to this.

Was this Mr. Duncan, Aid-de-camp to the General? I understood that he had been his Aid-de-camp.

Mr. GRAHAM, Secretary of New-Orleans Territory, was then sworn.

COUNSEL for the UNITED STATES. Please, Sir, state to the Court, all that you know about summoning these witnesses at New-Orleans, or any thing on the same subject.

WITNESS. Some short time before the arrival of Mr. Gaines at New-Orleans, I was summoned to come to Richmond as a witness. After Mr. Gaines' arrival, meeting with him, he told me that there was a public vessel coming round; and that it must be the most speedy mode of conveyance. I then waited on General Wilkinson, to know if I could get accommodated in this vessel, as my health was bad at that time. While I was with the General, he stated to me, that he understood there were several witnesses in town, who had formed a part of the expedition with Col. Burr: some of them were unwilling to come round. He asked, if I knew of any regular process which could be served upon those who were unwilling to come round, so that they might be compelled to do so. I told him I did not; that it was a question which the Judge of the Federal Court could answer. But, recollecting that there was a misunderstanding between the General and the Judge, I offered my services to wait upon the Judge, and to learn of him, whether there was any such process. Either at this time, or at a period somewhat subsequent, the Judge asked me, whether there would be any impropriety in advancing of money, and to what amount, to these witnesses. With relation to my question, however, the Judge answered—that if the witness should refuse to enter into recognizance, or to answer such questions as might be properly put to him, after he was regularly summoned, that then he could send him round by the power of the Marshal. As to the affidavit of Gen. Wilkinson, or to any other proceeding, I know nothing about it; save, that some days after, I called at

Judge Hall's chamber, where I saw Mr. Knox, in conversation with Mr. Keen. I had been there but a few minutes, when, after retiring, these gentlemen returned to the room. The Judge then asked Mr. Knox, whether he was prepared to answer the questions, or to enter into recognizance to appear. He refused to do either. I think I am correct, when I say, that security was asked for. The Judge has that clause of the law before him, which authorized him to act; and he pointed it out to Mr. Keen, and to Capt. Port; urging them both to answer questions, or to enter into recognizance. He added, that it would be very unpleasant for him to take compulsory measures; but, that he should be obliged to do it. Capt. Port particularly expressed a desire to know, what questions would be asked of him. The Judge shewed him a paper: he said that he was not bound to answer these questions, and the Judge might proceed as he pleased. The Judge sent for the Marshal; and these gentlemen were committed. In the afternoon, however, Capt. Port gave security for 500 dollars, and was released. I understood afterwards, that Capt. Port was to take his passage in a vessel to New-York, as he could not at that time leave New-Orleans.

Mr. HAY. Was this Lawyer (Mr. Keen,) there, to defend Mr. Knox? WITNESS. I do not know.

Question by Mr. KNOX. Was there not objection made to the Court by the Lawyer? I do not know but there was a doubt.

Mr. HAY. I understood that you applied to the Judge, because of the difference between Judge Hall and Gen. W. to know as to the proper mode of proceeding? Yes: Judge Hall and Mr. Keen, both of them, requested me afterwards to speak to Capt. Gaines, to take Mr. Knox out of prison, and convey him to the ship, as a more convenient place. Mr. Keen is an Attorney; and, I have reason to suppose, from his request for my interference, that he had some interest in Mr. Knox's situation. The treatment of this witness was spoken of, while on board. I think it was very good. I do not know what complaints could have been made. I know that the ship Beef was preferable to that which we had, who laid in our own stores. There were no constraints: they were permitted to do just as they pleased: they walked upon the quarter-deck, and slept where I did.

Do you know any thing about stopping at Havanna? Yes: Gen. Wilkinson objected to stopping, because it would tend to delay the passage: And, again, because it would give his enemies an advantage to censure him. However, we were obliged to stop there, as we were short of water.

Who was your commander? Mr. Reed, an officer of the Navy.

Who went into Havanna? Mr. Reed, Capt. Gaines, a young man, and myself. It was necessary that Capt. Reed should report his vessel to the government. After we had purchased our fruit, &c, we came off.

How long were you on shore? Not quite three hours. My impression is, that we should not have gone in at all, but that they fired at us from the Moro Castle.

Cross-Examination by Mr. MARTIN. Do you know whether part of the American Navy which is at New-Orleans, was considered as co-operating with the military?

WITNESS. I understood that when the Navy was sent there, that part of it was placed under the command of Gen. Wilkinson.

Have you any of the printed interrogatories? No, not one: There was one copy sent to the Governor of New-Orleans.

How long were you in New-Orleans? Two or three months.

On your way down the river, did you find any military guard? No.

What time did you go down, and with whom? I went down about March, in company with Capt. Fort and several others.

Did you not say, that Capt. Fort could not come away without great inconvenience? Yes, Sir: I took Mr. Fort out, and told him that the Judge was a good man, and there could be no danger. He told me, that Mr. Alexander had advised him the same.

Do you know any thing of Capt. Gaines' actions as an officer, or how he became a civil officer? It was at the request of the Judge, as I understood, that Mr. Gaines took the deputation; and, that he at first had refused it.

Did you make an affidavit? No.

Do you know who did? No. I said Mr. Gaines refused the deputation: He said he had come there to serve subpœnas by order, and did not want to do any more. He appeared unwilling; but, he was urged to it by others, and myself.

Mr. BURR to Mr. GAINES. I understand you hold a commission in the army? Yes.

What did you say with respect to obeying the orders of your superiors? I said, that I felt myself bound to obey all the orders, and execute all the duties charged to me by the Secretary at War.

But did you consider yourself bound by these orders, to accept of the office of Deputy-Marshal? I did not hear it, nor a suggestion of it from Gen. Wilkinson, or any other person. The Judge was the first person informed me, that there was any deputation for me to accept of.

Do you recollect that Mr. Fort was under arrest, at the period of that affidavit? I do not. I do not know that ever I was the affidavit.

Mr. WIRT. During the passage, did this man (Knox), appear as at other times?

WITNESS. As far as I know, he was.

Mr. MARTIN. Would he have been permitted to leave the vessel? As far as I know, he would. I saw no constraint. I only recollect his complaining, that he had nothing warm to eat. The Captain told him, that he must not say so, or make any complaints on the quarter-deck.

The evidence being closed, except what came by way of explanation afterwards, Mr. HAY wished to know whether the opposite Counsel required any argument, as the Counsel in favour of Gen. Wilkinson were willing to leave it with the evidence.

Mr. E. RANDOLPH. We require to place the testimony in its own order, and to shew the law.

WEDNESDAY, June 24.

Some difficulties were suggested as to the precise state in which this case stood.

The COURT said, it appeared in a double aspect: it appeared like a motion for a rule to shew cause, and like a motion for an attachment. The effect of any particular mode of conducting the argument, however, was immaterial, let whoever would commence or close.

Mr. HAY wished to know, whether there was to be any restriction to the usual number of two on each side, or what course was to be taken? For his part, he did not think it necessary to use an argument on either side.

No directions were given as to the course of argument.

Mr. Graham was again called.

Question by Mr. WIRT. I wish, with permission of the Court, to ask you a question relating to the state of the public mind about New-Orleans and in the western country, what is thought of Gen. Wilkinson's conduct respecting the examination of witnesses; and, generally, as to his having to do with it?

Mr. GRAHAM. What part of the country?

Mr. WIRT. Principally about New-Orleans.

Mr. GRAHAM. The public mind, in March last, was very much agitated; and the alarm was very great. I did not arrive there, however, until the danger was thought to be over; but there appeared to be much of a want of confidence.

Mr. WICKHAM. Who was danger apprehended from—Col. Burr or Gen. Wilkinson? Mr. GRAHAM. From Col. Burr. When I spoke of a want of confidence, I meant to say, that there was a considerable portion of the people of New-Orleans, who believed that there were other persons who were disposed to alter the Government, and who would be ready to join in any attempt of the kind. Such was the suspicion.

Mr. BURR. Do you know if there were any other means used to procure testimony, than what we have heard of; or any other species of testimony sought: such as private papers, or letters? Do you know of any measures pursued for that purpose?

WITNESS. I do not know what measures were pursued: I have heard that the Post-master at New-Orleans———

Mr. HAY. This has no manner of bearing on the question.

Mr. BURR. The charge against Gen. Wilkinson being, that he attempted to poison the sources of justice, any question that may relate to that object, must be to point. If it should come out, that

illegal measures have been used, questions on that point must be proper.

Judge MARSHAL. The Court were going to inform the witness, that he had not a right to speak of what other people said. There is a difference between this, and facts which have come within his knowledge. There is no propriety in stating hearsay evidence to the Court.

Mr. HAY. My objection is, to the question itself.

COURT. It is impossible to say, what the answer will be.

WITNESS. I do not remember that Gen. W. ever stated to me, how he obtained information. He mentioned to me, that he had received several letters; but did not say how. It was generally said in New-Orleans, that the Post-master there had given him the letters.

Mr. HAY hoped, that the Court would not allow this sort of evidence.

Judge MARSHAL. This is the same as before.

Mr. HAY. It matters not now, as every body knows how the letters came to hand.

Mr. WICKHAM. State what you know upon this subject.

WITNESS. I know very well, that the practice did prevail of opening letters; but it had ceased to exist, when I arrived in New-Orleans.

Mr. BURR. In your conversation with Gen. Wilkinson, did you understand of his having received any considerable number of letters belonging to other people?

WITNESS. He spoke to me of having received many letters; but, whether directed to himself or to other people, I cannot say. I rather think that I never did receive such information from Gen. Wilkinson, as his having obtained other people's letters through the Post-office; but I know, that there was a strong impression of the existence of such a thing in my mind.

Mr. MARTIN. Have you any knowledge that Gen. Wilkinson fixed certain posts at different parts of the river, for the purpose of examining papers and letters?

I was told, that there were posts fixed near New-Orleans; but, they were removed before I got there.

Mr. HAY. Do you know any thing of the fact?

WITNESS. No, Sir: This was before we came to New-Orleans.

Mr. WIRT. Did Gen. Wilkinson ever say any thing to you about getting letters improperly from the Post-office?

WITNESS. No: He did not tell me how he got the letters.

Capt. JOHN A. MURRAY was called by Mr. Burr, and sworn.

Mr. BURR. Were you in New-Orleans in January, February, and March last? Yes.

Of course you know what passed, and what posts were established up and down the river.

WITNESS. I was an officer commanding the guard, a few miles up the river.

What were your orders? They were, that I should stop all the boats; and if I found any suspected persons in them, to stop them for examination, and hold them under guard until Court.

Were you to seize on papers? Yes: I was to examine all papers.

If you found any papers or letters that you suspected to be connected with the supposed plot, did you transmit them?—for instance—a letter to me, or a letter to the Governor? Yes: I certainly should have transmitted them.

Was there also a post below, on the river? I believe there was.

Do you know if they had orders to search also? I do not know.

Mr. HAY. Did you receive these orders from Gov. Claiborne? Yes.

Mr. BURR. Would you, as a military man, obey any orders from the Governor? Yes.

Because he is your superior? Yes.

But not as a commanding officer that you found yourself to obey any orders from him? No.

Mr. E. RANDOLPH began the argument. He stated, that this was a motion made to the Court, for an attachment upon General Wilkinson, to bring him into Court, to answer such interrogatories as might be put to him for a contempt. It was customary, he believed, wherever strong suspicions should be excited, in cases of this kind, that an attachment should go; because it is always in the power of the party who is charged, to purge himself upon his own oath: if he does not do this, it must arise from a consciousness of his own guilt. Wherever a presumption of this sort should be well established, having had the advantage of every thing in the power of the person charged, and yet omitting to avail himself of it, the Court will take pointed measures upon the contempt.

As this case now appears from the testimony, the charges no longer appear to rest, as were first insinuated, upon the evidence of James Knox; against whom so much has been intimated of enmity against Gen. Wilkinson, and desire to destroy his character; but, we have strong inferences to make from the testimony of two witnesses, who gen. W. and his friends have introduced to vindicate those acts of which we complain. Had we been so happy, Sir, as to have enjoyed such a discovery and knowledge of facts on our side, as those of which our opponents can avail themselves, I have not the least doubt but what we should have been able to produce to you an history of those transactions, infinitely more detailed and strong, than I own to be in our power now to do. Judge, Sir, of the nature of our standing, when we must inevitably gather so much from the Defendant, through the very evidence which he must naturally suppose to be the best he can produce to

answer his purpose. Give me leave here to pay that tribute which I shall always with pleasure avow, where I may discover it to be due. I discover a frankness and manliness in the relation of testimony, which merits my warmest regard. The perspicuous and unequivocal testimony of Mr. Knox, is well corroborated by that of the gentlemen who have been introduced by our opponents. Mr. Graham and Mr. Gaines have exhibited the case in those colours, which must meet our wishes. Mr. Gaines was in the army, and was made (by word) a Deputy-Marshal. I feel a repugnance here to enter into the examination, and compare this germ of alliance of the civil and military character in this one gentleman, when the civil, did not require the aid of the military arm. I must confess myself not to be sufficiently versed in the arcana of office, to see the necessity or propriety of such a commixture; or how it is, that Executive and Military powers can exist in the same person, even with the advice and consent of the Judge: an union formed in obedience to a military superior, for the single purpose of catching and detaining unfortunate men, who happen to be witnesses concerning a certain transaction. Am I mistaken, when I say, that the tenor of Mr. Gaines' testimony establishes the fact beyond a dispute. It is not necessary to enter into the testimony, or enquire what the purport of the orders was: It is enough, that orders were given to transport a witness to a great distance; and, that these orders were carried into effect by a military officer. The inference I draw from this, is—that something of a military power was intended, and was exercised. That it was of a military tenor and complexion, we must infer, from reflection: for, can it be supposed, that there were so few honest men in New-Orleans, as that no civil character could be found to execute a civil process!—an office that any man could fill. When was this project of combining two offices together of a different nature, first conceived. It is an union which no possible position of affairs will justify, and which the policy of government loudly forbids. It is immaterial, whether it originated with the Judge, who was infected with the mania, which Gen. Wilkinson had excited; or, whether it sprang from Gen. W. himself, since he excited it. He was a military officer, appointed to do civil duty, without the least emolument. And how was he appointed? I will venture to say, that neither in truth nor in law, was he a Deputy; because he never submitted to the necessary forms. According to the act of Congress, a Deputy-Marshal must give bond for the just performance of his office. He is to qualify himself in the same way as his Principal; and, until he does that, he has no more the powers of a Deputy-Marshal, than any other person.

[Mr. Gaines here was called upon to shew his deputation, which he did.]

Mr. HAY said, that there could be no necessity of a bond, for this special purpose of removing one individual witness.

Mr. E. RANDOLPH differed from that opinion. Was he not a

Marshal? If not, what was he? He was nobody, with respect to power: He was a man, who acted wholly unauthorised. If it is conceded that he was no Marshal, it states just what I was about to prove; for he possessed no civil character whatever, and had no right to assume one. Sir: the frankness of Mr. Gaines acknowledged to you, that he did not conceive this civil assumption to absolve him from his military responsibility: for he said, that if Gen. Wilkinson had commanded him to have put Mr. Knox in irons, he should have done it. Here, Sir, we have the true nature of this business unravelled. A man without any authority according to law, had an interview with a Judge, at the order of his superior officer. He is to receive a civil appointment; but the Judge hesitates to give him this authority, without the appearance of a cause. Well, to shew this, an affidavit must be produced: Gen. Wilkinson is ready to afford relief in that difficulty! Is not all this knowledge of the fact, and the object to be obtained, a clear proof that the same Gen. W. was a party, and a prominent mover in this transaction? Yes, Sir: he wilfully contributed to the transportation of this man, under the authority of himself—knowing that he acted illegally. Do not let me be told, that this was an act founded on the necessity of the case: that will not legalize it. The privity of Gen. W. to the transaction, and the demand of the excessive bail by the Judge, for the witness to appear 1200 miles off, are sufficient to ascertain the feature of the action. I am aware that it will be said, that any witness may be bound over with security, to appear at the trial, wheresoever it might be held: but, where is the right to procure bond and security, or cast a man into jail, when he is willing to come to the place of trial; and merely because he cannot give security to the excessive amount required. Is it to be supposed, Sir, that this witness could give bail to that amount? This is an outrage (I may call it a judicial outrage) of a destructive nature, to that distinction which ought to ever subsist between the departments of a government, whose wish is to preserve a wise distinction between its parts, so as to protect the citizen in his rights. Sir: whether security is asked to an amount which cannot be accomplished by the person of whom it is asked, it is the same as though he was committed without the offer. And what can be expected from a man who is already in jail? In jail for the sin of being a witness! But it will be pretended, that this is not the act of Gen. Wilkinson, it is that of Judge Hall. But how is Gen. Wilkinson clear of it? Judge Hall will act, but he wants the authority: Gen. Wilkinson will contribute his mite to complete the scheme, and so the act is completed. Here is Mr. Knox arrested upon the affidavit—committed to prison—kept there—and then removed on board the vessel for transportation: and all at the instigation, and by the intrinsic power of the Commander in Chief of the Army and Navy of the United States: this same Commander in Chief who consents to the drawing of money from the military chest, for purposes indentically connected with the whole business.

In short, Sir, if you look to any part of the transaction, you will see the same military features strongly marked, and Gen. Wilkinson at the bottom of it. Did he not consider himself, and was he not considered as possessing positive and uncontroulable powers over this vessel? Did not he authorize Mr. Gaines to offer a passage to the witnesses; and, was not his will on board considered as paramount?

Besides: The military feature is observable in the order which Capt. Gaines gave to Sergeant Dunbaugh, to take the witness out of prison, and put him on board of the vessel. This was in true military stile. Wherein is the civil officer observable here. He orders the Sergeant to do an act, which he is obliged to obey; and this was all under the subordinate directions of Gen. W.—and so the whole appeared, even until their arrival at Hampton, and their passage afterwards up to Richmond. How can we be at a loss, when we see the Attorney General's letter, directing subpœnas to be put into Gen. Wilkinson's hands?

Mr HAY called for such a letter,

Mr. E. RANDOLPH. There is no difficulty about that.

Mr. HAY. There is a difficulty: I wish to see the letter.

Mr. RANDOLPH. Then I wave the subject, and go on to other testimony and facts, about which there can be no difficulty. The fact is, that subpœnas were sent to Gen. W. Now is it not a little singular, that subpœnas should be granted in a criminal case, to the Commander in Chief, to be filled and served agreeable to his pleasure? If he does not command, does he not strongly recommend to Mr. Gaines, to find out where Mr. Knox is? Does he not, in fact, direct all the business of the affidavits? Now how came Gen. Wilkinson's affidavit in the hands of the Judge? It does not appear who carried it; and, the strongest presumption is, that he carried it himself. In short, every feature of the proceedings go to shew, that there was not the smallest thing but Gen. W. observed to answer his purpose. Do we not find him employing an Attorney? and for what? Are we to suppose that the military chest is to be converted to his employment of Lawyers? No, Sir: but it was his ardent wish to give the whole scene a military appearance, and yet to escape without the censure. Mr. Gaines told you, that Gen. W. must have known that Mr. Knox was put on board unwillingly: and, notwithstanding his supreme power, yet he permitted this man to remain a prisoner—torn from his family and friends—an exile from his country—and deprived of the common means of preparation, for a long and an uncertain voyage! Mr. Graham tells you, that Gen. W. informed him, that there were some witnesses who were unwilling to go; and asked him, what measures were proper to be used to compel them. See his solicitude through the whole of the business. It appears that Gen. W. had been applied to for the liberation of Mr. Knox; that Gen. W. himself took his parole of honour at Hampton, to come here; and that it was none but Gen. W. that gave him liberty. We find him,

blandishing as a military commander at one moment; and, at another, acting the farce of an insinuating courtier. Are you a freeman? says he to Mr. Knox. And why ask this? Terror was at first tried; threats were employed; but, finding no effect could be wrought by those means, see him changing his tone to cajoling: Sometimes softness, sometimes severity, in order more deliberately and effectually to execute his deep-laid purpose.

Sir, I think that through the whole it is clear, that unwarrantable efforts were made to compel Mr. Knox to give testimony to the most flagrant invasion of his privilege as a witness; and that in the execution of this measure, he was unjustly arrested and imprisoned; and so kept, until safely brought within the neighbourhood of this Court. On these particular facts, I mean to make some observations.

First, Sir, we find the witness is arrested, imprisoned, and put on board of a ship for transportation. Here, I will not stop to look at the insinuations thrown out against Mr. Knox: they are nothing at all. Mr. Knox had been summoned by the United States to appear, and we have a right to rely on his character as a witness who was to appear for his country. His expedition, therefore, down the river, frees him from the blame of the transaction; and encourages me to say, that he is a man of credit. How is it, then, that he is one moment a witness, and at another a criminal: and that, merely because he is a witness. This makes an impression, that something must be wrong. The fact is indubitably fixed, that this originated with Gen. Wilkinson: and for what motive, it may be asked? The motive cannot be doubted, when it is considered what was said the other day—"That Gen. Wilkinson was a pivot, if not the only pivot, upon which the prosecution turned." This is evident, by the Government not choosing to hazard the prosecution without his presence. This is a fact which we have had frequent occasion to notice, as well as to remark the great stake which Gen. W. has to run himself. From these considerations, we may safely say, that the names of Burr and Wilkinson are antipodes in regard to consequences. Gen. Wilkinson never can regain his meridian brightness, until he can draw Col. Burr into darkness. He has granted this himself; and, it is his duty to take care that, like some demigod, he does not fall, with irresistable force, from his government; tumbling down amidst the ruins of matter, which he himself has erected. It needs but an examination, Sir, to discover that he is borne down by the weight of his own testimony. The evidence proves what he has done; and, at the same moment, the motive which excited him.

I shall now shew, may it please the Court, from the law itself, that these actions amount to a contempt of Court. [Mr. R. here read 3 Hawkins, 286, 290, 293, 299, to adduce the general principle of contempt.] But contempts, he observed, were so amplified, that it would be in vain to make an universal reference. It is a principle of law, *not to use lawless force, violence or terror, in making an*

costs—[3 Hawkins 275, ch. 22, sec. 3.] But what is here the case? Here is a man, going about his own business, taken as a witness—examined—terrified, and thrown into jail: he not being able to give heavy bail. He is placed in the hands of a military man, under the assumed name of *Deputy-Marshal*, and who has not a particle of legal authority to vindicate his actions; but is under the most immediate controul of Gen. Wilkinson himself, who has the supreme authority over him, until he arrives within a very few miles of Richmond. What, Sir, I would ask, would the corrupt Court of England say to this? Securities of this kind never have yet been exercised; and the utmost that ever has been done to a witness, has been to bind him over for his appearance at trial to give testimony; and, neither in this country nor in England, have we seen compulsory process issued in the case. Our inference necessarily is, that every compulsion which is used, and which the law does not prescribe, is illegal, and subject to prosecution. No force is to be used, except where a person shall refuse, or where he has failed in his appearance. But here, the only plea is, that he refused to make an affidavit. Now if a man will voluntarily go before a Magistrate, and make affidavit of his own accord, none can prevent him; and, if I understand the doctrine of Blackstone and others on this subject, an affidavit should be *voluntary*: but here, on the contrary, we see every species of restraint and compulsion. If we look at the power of a Magistrate as to affidavits, in Graydon, 250, sec. 33, or of the Marshal to imprison, we shall discover that Judge Hall proceeded extra-judicially in this case; for the gentleman charged, was not to be examined before him: and, therefore, all that was to be done, was to subpœna the witnesses, and direct them to appear in this Court, to give evidence. If this act of Judge Hall was unlawful, I infer, by a strong principle of law, that every person connected with it, acted unlawfully also, in as much as they contributed to do an unlawful act.—Thus it is, that we contend that Gen. Wilkinson participated in the offence.

I am really astonished at the rapacity of the circumstances attending this uncommon scene; and, at the blindness of the subordinates to this *great Principal*. Here is affidavit after affidavit, and never enough to satisfy his gorgeous appetite. But the atrocity of the circumstance is, if possible, heightened by the consideration, that these affidavits were drawn from printed interrogatories: a species of evidence which pinned the witnesses down to particular points, from which they could not diverge. We cannot but see the evils attendant on this mode of evidence. The mind must necessarily be intimidated; so that it is extremely probable, that all the circumstances will not appear. Besides, a failure in recollecting of what the witness has already answered, is probable; and, perhaps, his answering to questions yet unasked, might produce a want of uniformity; which, though not in itself untrue, might operate to destroy the benefit of the testimony; and, perhaps, the character of the witness, as a man of veracity. This punctilious regard to re-

putation, which is natural to men, might operate as a strong barrier to the divulgement of facts which, unintimidated by these circumstances, would be produced. Thus the man's own breast might be, by the mismanagement of the examination, made the depository of secrets, which justice to mankind requires the production of. And, Sir, I will venture to say, that in a case like this, it is more forcibly palpable; for, nothing can be more dangerous, in this country even, than the power which men on the part of the government will be prone to exercise. Instance the present case: Here is a witness compelled to give his affidavit; taken *ex parte;* taken before a Magistrate who was created by that government, and whom he was bound to obey; and who would fail, from some cause or other, to express the words precisely as they were intended to be conveyed. Now suppose his words under all these disadvantages, to be produced to his face before a Court of trial; and he should, without inclination, deviate a little from the words taken by this authority at a distant time—in what situation would he be? He would be told, that he must not go from the words of his deposition, because he had sworn to it. Who can be safe from the direful effects of a measure of this sort? We are told that the Bill of Rights give us the privilege of being confronted with witnesses; but, were this mode of proceeding to be adopted, it would entirely change that course. To confront witnesses, is the only means of drawing out facts, and giving them their true appearance: ignorance and intention are alike discovered. I think, Sir, that we cannot do better than adopt the same principle in law, as is expressed in our most holy prayer—"lead us not into temptation:" but, what a conflict must the man have to struggle with, who has been hastily forced into a declaration of facts; which, several months after, he is called upon to make an oral repetition of. We have numerous cases in the books, which are worth our examination, upon this subject; and, among the rest, Sir, permit me to refer you to 5 Vinor, 444, plea 5; and 446, plea 44—2 Atkins, 469—and 2 Vesey, 520. Why are publications to prejudice the public mind prohibited? Because it may tend to bias the mind of those who may afterwards be called on the Jury. Why is such caution observed in taking evidence, but to prevent false swearing? Why is tampering with witnesses censured? because the mind shall be left free and unbiassed. No influence whatever is to be attempted, either of hope or fear, of reward or threat, to awe the testimony in any way. We have heard the facts on this case, and the way in which Mr. Knox was tampered with; although it appears that his mind was superior to every effort; and although the military power was called to be a substitute for the civil, through the whole apparantly judicial transaction until his delivery here, yet we find him incapable of acquiescence to the will of his persecutors. If there was no more in this transaction, than the determination to obtain the affidavits; or to immerse the man who dared to refuse, in a loathsome prison, it would be sufficiently marked with evil. I have always supposed, that the

privilege of a witness was well secured, and never before have heard of its being invaded: but here it is trampled upon with impunity:—A citizen of the United States, is dragged by corporeal force, and thrown into jail for being a witness, and without any one alledged fault. I hope, Sir, that we shall not be told of any dangers of conspiracy, or of any past tranaction, in which a forced inference might suggest Mr. Knox to have been engaged, as an argument for this insidious attack upon the liberties of a citizen: this cannot vindicate the outrage, Sir. I hope the time will never come, when a man, not guilty of a crime, and without even the imputation of one, will have to depend upon the gratuity, or submit to the severities exercised by military commanders with impunity. But it was so in this case; and, after having been compelled to remain at New-Orleans until a vessel was ready, he was transported 1200 miles, not only with the knowledge, but at the instance of Gen. Wilkinson: transported, not for trial—not with the charge of an offence—but merely because he was supposed to know something of a certain tranaction: for the iniquity of being a witness, or suspected of being one.

What, Sir, is the consequence of such a measure? What, but the most severe despotism. Were such measures suffered with impunity, it would be nothing for a military commander to say, that such or such a person might be material in a certain point; and our most peaceable and valuable citizens may be deprived of liberty, put on board a ship, and transported a voyage beyond the seas at any time. Sir, it is impossible to feel our independence, and not to be sensible of the most marked indignation at such conduct. It was this crime which the British government committed against us, that roused the patriotism of an enraged people to declare our independence: and, if this principle be the basis of our liberties, shall we create among ourselves the same seeds of despotism? What if be not the same Caitiff, or the same Cataline, whose rod nations have experienced? What if it be not the usurpation of Great Britain, shall we be the less watchful? Sir, it is founded in human rights, and on the blessings of that security which we ever ought to be jealous of preserving. It is upon the Government that we depend for our protection: it is to this Court that we look with confidence to defend ourselves from the usurpation of any branch of the Government. Unless some of these doctrines and practices, which we have so long reprobated, should be restrained—that military force, which is intended to support our civil rights and liberties, may be brought to operate to a waste of our country, and a prostration of those principles so dear to us: whilst the criminal shall escape justice, and the innocent man suffers. Sir, I feel abhorrent that an innofensive individual should be stopped in a laudable endeavour to locate land for himself and family, for their further subsistence; should be taken up, far from his home, and transported as a witness 1200 miles, to the entire frustration of all his laudable intentions. I trust rather, that transportion will be reserved for the

guilty: but if such things as these may be done deliberately under a green tree, what shall be done under an old tree? What is to be the effect of such a precedent as this? We may seal the limit of consequences in this particular case, and say it shall go no farther; the like shall not be done again; and that it was only the imperiousness of the circumstances that could justify it: but this will not be our safeguard: for although we may be safe from danger, yet remember, that our children may lament the moment when their forefathers gave the power out of their own hands.

But, Sir, it may be said that these circumstances were extra-territorial, and that Gen. Wilkinson was not engaged in the whole of it. But is it so? Do we not find Gen. W. in every part and period of it. He was at the beginning—he was in it when the man was imprisoned—when he was transported—and even to James River itself. The spirit of Gen. W. pervades the whole, and he is every where seen: not merely as an integral part, but as a first and moving cause of the whole.

But how is it out of the limits and jurisdiction of this Court? Shall this Court suffer its witnesses to be abused, merely because the act was committed without its jurisdiction? It ought not to be. But I contend, Sir, that it was within the jurisdiction of this Court. There must be a power in every Court, upon just and equitable principles, to procure the attendance of witnesses; and wherever that power extends, such witnesses are protected by the same power. Gen. W. is here present; and, it is here that the fact ought to be examined. Whatever effect it might have upon the character of Gen. Wilkinson, an examination into it ought to take place; because Gen. W. ought to have preconceived all consequences, before he had proceeded to that length. He ought to have known the consequence of interposing the sword with civil authority. He ought to have known the danger of tampering with witnesses, as well as of holding terror forth to them. He ought to have known, that either to practice upon their fears or their wishes—holding out to them rewards or threats—consists not with the true principles of justice. And this is not the whole, nor the most essential evil, when we take into view the mass of letters which were examined in the Post-office. Yes, Sir, it would be impossible for gen. Wilkinson to divest himself of the consequences of this outrage on private correspondence. The day will come, when he will have to lay aside all that pompous military array, with which he has been wont to be surrounded at New-Orleans; to stand before this Court; and, with nothing but the common rights of mankind to protect himself, to answer for this imposition on those rights. Then let him purge himself of the guilt, and prove that he has done justice to his country. This is a matter of magnitude sufficient to command his most serious regard, because it is an enquiry which must be listened to. This being the case, I must insist upon my motion, that an attachment do issue. If he be innocent, let him come forward and prove it. If he be guilty of usurpation of pow-

ers not belonging to him, let the country be satisfied, by the application of a competent remedy to the evil.

Mr. MARTIN said he should not now go into the general detail of the subject, but content himself with making such quotations as would evidently prove, that the conduct of gen. Wilkinson at New-Orleans was without the colour of law; and that the Magistrate had acted as inconsistently and illegally. If the gentlemen had any thing at all to rely upon, he presumed that it was the act of Congress; but, in this confidence, he presumed they were mistaken.

Mr. HAY. The gentleman had better wait, and not anticipate the strength of our foundation, lest he should find his own to be deficient.

Mr. MARTIN, presuming that reliance would be placed in the 33d section of the judicial act, Graydon, p. 250, merely wished to say, that the intention as to the examination and removal of witnesses, referred only to where the examination was held before a Magistrate, and where the arrest was made before the same Judge. Mr. Burr was not committed by Judge Hall; but was seized upon, and transported more than 1000 miles for examination. Some of the witnesses were examined before Judge Hall: but this examination, according to the doctrine of 2 Hale, p. 51 and 258, that the jurisdiction of a Magistrate out of the county is only a consequential jurisdiction, is also corroborated in M'Nally, 314. It appears, then, that every thing which was done by Judge Hall at New-Orleans, at the instigation of gen. Wilkinson, was extra-judicial, and could not be resorted to.

But here (said Mr. M.) I must anticipate the argument of *necessity* which would be held up. *Necessity*, then, is to cover even enormous errors in jurisprudence. What says Lord Camden, 1st vol. State Trials, 320, in the celebrated case of John Wilkes; 3 State Trials, 222–4; 1st vol. 709–10; and 7th vol.—all which cases it would be well for the Court to examine.

Mr. M'RAE. The question is, particularly—whether general Wilkinson has been guilty of a contempt of this Court? This depends upon the evidence entirely: and this evidence has been gone through. We were, and still are, so confident of the clearness of the evidence to the point, that we are willing to trust the decision nakedly upon those facts. But however simple we think it, the gentlemen are determined upon a long argument. We, however, yet hold out the same offer, and are willing the argument should close where it now is: not apprehending but the Court will justly discriminate.

Mr. BOTTS and Mr. WICKHAM said, the gentlemen might take what course they pleased; but, on their part, they should continue the argument, even if silence was observed on the other side.

Mr. M'RAE said, that although he should have willingly been silent, if his opponents had been so satisfied; yet, as the argument was pressed, however unnecessary it might be, it was incumbent on him to make a few remarks. He could not but regret, that so

much time had been spent on every trifling part of this case: he did expect that the offer would have been accepted. He observed, that in the whole of his short practice of law, he had never read nor heard of a case similar to the present one; nor did he think, that all the annals of forensic learning could produce a similar one, either in this, or any other country. Mr. Randolph, knowing this to be the case, found it necessary to read 3 Hawkins, to bear him out, in the event of a want of precedent.

In my observations, by way of reply to the unmerited, yet lame attack upon gen. Wilkinson, I shall clearly prove the justice and propriety of my opinion, that no such case did ever occur. But before I proceed farther, I shall state that gen. W. is, by the law of the land, doubly protected from any danger which might be apprehended from a motion of this nature, in this Court—even admitting all the facts as stated, to be correct: which I must deny.

The ground upon which gen. W. is charged, is the obstruction of the administration of justice, in two distinct actions. First—in drawing from Mr. Knox, against his will, something relative to this transaction: and then, for forcibly bringing him round from New-Orleans to this place, against his will, to give testimony here. Now, Sir, if both these charges were identically true, I contend that they would not warrant this motion for an attachment. I will shew that they would not. Admitting, therefore, for a moment, the truth of the charge, the law does not give this Court the cognizance. And why? Because the offence was not committed within the jurisdiction of this Court, but at New-Orleans. Were it even a real offence, (much less, being a pretended one, and of this description), I could not conceive that it ought to come before this Court. I should even deem it an insult to the understanding of the Judge, if I were to use an argument to prove, that an offence was cognizable by this Court, that was committed out of its jurisdiction.

But, suppose the alledged crime to have been committed in the district of Virginia, and within the limits of this Court—then I must say, that Gen. W. would not be answerable in this form, and at this time, because he is brought here as a witness; and, as a witness, he is privileged against a proceeding of this sort: He cannot be arrested under any accusation of this description, nor brought to Court to answer any such charge. I do not know, that there is any direction on this subject in the act of Congress; but, whenever the privileges of a witness come in question, it will be proper to refer the Court to the act of Virginia, which will be found in the revised code, p. 278. Witnesses are therein freed from arrest, while attending as witnesses, except in cases of treason, felony, or breach of the peace. None of these charges have been made in the present case; and therefore, I would ask, why should we be refused the benefit of the act of Assembly? Where is the argument, or where the evidence that can refuse it to us? Were we, therefore, willing to cling to the law only, we might

safely rest our defence here. But, Sir, an argument is insisted upon, there shall be a full investigation of that character, which we can never shrink to explore; in whose every step, we discover the Soldier and the Patriot. If upon the most strict examination, he should appear worthy of censure, let censure be pronounced: but, if he shall appear to have deserved well of his country, let him not be deprived of those high encomiums which his praise-worthy conduct merits.

When Gen. Wilkinson looks back to what he has done respecting Mr. Knox, he will say, that he has done nothing wrong: he will feel that pride which integrity never fails to inspire. Sir: that man has ventured his happiness, his fame, and his life to the service of his country in this transaction, whilst attempts were treasonally made to subvert the civil liberties and happiness of that country.

Mr. M'Rae here ascribed to Mr. Randolph an opinion, that if there was not ground for the attachment from the evidence, Gen. W. should be interrogated. He contended, that it was improper to ask for condemnation out of his own mouth.

Mr. Wickham said, that Mr. R. had taken the cause pointed out by the Court, which Judge Marshal here explained to be: That if there was ground for an attachment, it might go, and the person be brought into Court—then to answer interrogatories in his own defence.

Mr. M'Rae thanked the Court for the explanation; but, he certainly had understood Mr. Randolph (who was not present), to have advanced a contrary doctrine: which doctrine was oppressive and unjust, as well as contrary to common sense and law: as would appear in Oswald's case, Pennsylvania—1 Dal. 328, and the Bill of Rights.

I trust, Sir, that in this motion to obtain an attachment, it is not sufficient to rest on mere suspicion, said to be entertained against Gen. W.—a suspicion that he has practised a contempt upon this Court: but the evidence must be clear and full, and coming from the most disinterested witnesses.

The question then is, whether he has committed this offence or not? Mr. Randolph is so assured, that he tells the Court, that they have not to rest on Knox's evidence, but that our two witnesses confirm the fact. Why, Sir, surely that gentleman has drawn a conclusion wholly destitute of proof. He has added conjecture to conjecture, till he has lost himself; although he has laboured to convince himself, that the Court are convinced of a position, which, in reality, has no foundation. I fear not to affirm in the defence, that it will be out of the power of the whole of the gentlemen who oppose us, to point a finger to that part of the testimony that will convince the Court of a contempt, or even to excite a doubt upon the subject. I must be obliged to pass over some of Mr. R's conjectures, (which I hope will not be considered disrespectful to him), because I really do think that they will not merit an investigation.

a few of them, however, I shall notice. The first he states (and which he thinks is a conclusive point, and which our witnesses have proved), is, that a military man was made a Deputy-Marshal: and this he conjectures was concerted between Judge Hall and Gen. W.—by which plodding contrivance, this man was brought here under military authority. But here the gentlemen unfortunately forgot the relation of this affair made by Mr. Graham, on whom he relies. Mr. Graham said, that Gen. W. consulted with him what course to take; that he recommended an application to Judge Hall; but, that he did not urge Gen. W. to go; for knowing of a shyness between them, he would go himself. Where, then, is the concert between those two men? Away then goes the conjecture, as all the rest soon must.

But a military man was made a Marshal; and, he conjectures, it was under the direction, or at least at the approbation of gen. W. But, Sir, does it appear that ever gen. W. said any thing about it? Was it not said by Mr. Graham, that he advised Captain Gaines to accept of the office; and that Judge Hall and others did so? But among all his advisers, gen. W. was not one.

Again: Mr. R. goes on to prove, that the acts done by Captain Gaines were against law. Suppose, for argument sake, we grant it, (which we do not admit), what is that to gen. W. Why, Sir, it has been thought a very hard rule indeed, which was laid down in the scriptures, that "the sins of the fathers should rest on their children:" but, really, this is much worse. Here the gentleman, without ever proving the act to be unlawful, imputes guilt to gen. W. for what was lawfully done by Mr. Gaines.

As to the lawfulness of the conduct of Captain G. I will not trouble the Court to read Graydon's Digest upon it: but there it will be found, that the Marshal has a right to call in any assistance when he shall find it necessary: not only in the way of a *posse commitatus*; but the words of the act empower him to do so, to assist him in the performance of his office. I do not know whether they are fully broad enough to cover this particular case; but, whether or not, gen. W. is not to be answerable for the error, if it be an error.

Away then Mr. Randolph skips to Judge Hall; tells the Court that he has committed an outrage; and lays all this at gen. W's. door: but, by what authority, I cannot see. I must be permitted here again to refer to the misunderstanding which Mr. Graham says subsisted between gen. W. and the Judge, to prove, that he did not act at the instigation of the general. Now, gentlemen must shew the connection to have subsisted between these two characters, (who we have proved to be unconnected), after they have proved the error, before they can saddle it on gen. W. But among these outrages, and of which gen. W. partook, was the removal of Mr. Knox from N. Orleans to this place, to be a witness. Now, I presume that there is an act of Congress providing for such a removal from one district to another. It might be, because he could not come under the very letter of the law, where

the accused was not to be tried in the same district as that where the witness was served, that the Judge thought proper not to send the witness alone; but, it may be, the accused having been brought before him, he supposed himself to have power to send the witness to where the accused was: Thus there will not appear such an outrage. But, whether he has committed an outrage or not, we ought not to be called upon here to answer for him. It deserves no respect, unless that gentleman was here himself to answer. But gen. W. is not, necessarily, to be acquainted with every step that Judge Hall has taken; he is not to be charged with the violation of his office in the evidence which is brought against another, and which certainly does not bear.

But leaving the Judge, and his supposed outrage where it is, (for we have nothing to do with it here), we will follow Mr. Randolph in his discovery of a very great secret, which no one else could have thought of but himself, and which is of a nature as extraneous as any of the rest. It is, that a military order was given to Sergeant Dunbaugh by Capt. Gaines; and because it was a military order, it must have emenated from gen. W. Why, Sir, this is in the very teeth of the proof. Mr. Gaines swore that he had not given him a military order; that it was not in that capacity he issued it. I saw the gentlemen curiously looking at the order: they wanted to see whether the title "*Captain*" was at the bottom; but, there was no such thing. To be sure, it was addressed to Sergeant Dunbaugh; but, there being no military signature to the order, is a proof that he was not acting in that capacity. Capt. Gaines not only said, that he had not given this order as a military man; but also, that he did not act, in it, under the authority of gen. W. but solely by drection from the Marshal. In every question asked of him, he denied its military tincture; that he gave it to Dunbaugh, not as a Sergeant, (for he did not command him), but on account of his having obtained his promise to perform that service; or else he should have given it to some other person. Now, Sir, if Mr. Gaines had been acting as Captain, and Dunbaugh as Sergeant, would he have gone to him, and asked him "*if he pleased* to do so and so?" No: he would have commanded him; and, his not doing so, clearly disignates the civil character of the transaction.

But Gen. W. is a great criminal, because he consulted the District Attorney what to do. Sir, this is the very course which this valuable *citizen* and *soldier* ought to have acted; and, the necessity of it struck him. He was fearful of doing wrong, if he acted by the impulse of his own mind; and yet reproach is cast upon him, for the very cause which he took to avoid it. Can this charge stand for a moment against him? It cannot possibly. But they say, he advised others to obtain legal advise from the Attorney, and another law-character. And is it indeed criminal, that a gentleman, called upon to aid the Government in bringing witnesses a great distance, should be advised to consult with the best law-characters on the subject? It really appears to me contrary to my rules

of uniformity or propriety, to urge such an objection: but, it is no wonder that the gentleman is so eager to catch at such chaff, since his whole structure is built on *conjecture*. But it appears to me, that Mr. Randolph forgot that he was addressing this honourable Court; and, feeling as he does, when he sometimes addresses gentlemen not learned in the law, and forgetting his case, he attempts to excite the sympathy of the Court. He tells you, Sir, that this man (Knox), was forced into a ship by gen. W. (without gen. W. having any thing to do with it); that he is torn from his family and friends, without indeed knowing that he has any family or friends; dragged away from his country, and transported to this place. What country? A country in which he had been for nearly two months! Alas! alas! He is torn from this, his country! Let this melancholy picture take its own weight: we are not afraid of its effects.

But this gen. Wilkinson is a curious sort of an animal: sometimes he uses all the blandishments and fawning caresses of a courtier; and in the next picture, you see him acting as the most bitter, rapacious savage: all by fits and starts. But where is the evidence of all this? Does Knox say that he was treated cruelly by him? Does he complain of hard ussge on board the ship? No: he does not. He speaks of gen. W's. attention to him on board; and says, the provisions on board the ship were good. Mr. Randolph must have misunderstood the relation, or he certainly must suppose the Court to have forgotten what was said; or he would have not ventured to complain, for this man, of savage treatment by gen. W. Now if it was true that gen. Wilkinson put him on board the ship—transported him to Norfolk—then brought him to Richmond—in the way, and under the hardships which Mr. R. boldly represents—then indeed there would be ground to complain of him: but it was not so. Certainly these facts ought to be proved, before such freedom is taken to adress the Court. I need not enter into a detail of the evidence; but state a few facts, as they shew themselves. By whom was Knox taken in custody: by gen. Wilkinson? No: but by the Sheriff. Before whom was he taken? Not before gen. W. but Judge Hall. He was bailed by the civil authority. All of it was done by virtue of the civil office held by Capt. Gaines; and, not one particle of it was known, or consulted on, by gen. W. Was he not also carried on board, by the Deputy-Marshal's request to Sergeant Dunbough? All this is sworn to before this Court by Capt. G. and, that gen. W. had not a particle of concern with it.

But it is a most important concern, to affect gen. Wilkinson's conduct and reputation. It has been often said, that he is regarded as a most important witness. If the course which has been pursued by these gentlemen can justify the opinions, (and surely it can), then gen. W. is the *all-important* witness in this case; for scarcely has one question been argued, but we have heard some sort of obloquy or other about this man. Was it not rumoured before he arrived, that he dared not shew his face here; he having done that which he

ought not to have done?—That it would make him tremble when brought to confront Aaron Burr? But that time has passed away: he has shewn that he is not afraid to face Aaron Burr, or any other man. And now, when he does as it is his duty to do, to make his appearance here as an other citizen would, do they let him rest? No, Sir. Some of the worthiest and most honest men in this country, thought there might be ground to fear that he would not dare to come: but this magic, which has all along been exercised, has vanished. And now they attack him (not having any thing else to urge against him) for what was done by others, of which he knew not a syllable. Sir, do not this Court plainly see, that gen. W. has done nothing in this case to obstruct the administration of justice? His great crime charged, was—that he concerted with a law-officer to do arbitrary acts: for which high sin, he is charged with obstructing the administration of justice. Whether it be so or not, the Court will judge. I know that they will proceed upon this, with fairness and decision. The conduct of the Court is entitled to admiration, when we view with what almost unexampled patience it has heard the arguments on the numerous questions which have been agitated. It is doing ample justice to the parties, to hear, in a case of such magnitude as this. Sir, I admire the attention of the Court; and, I trust, that whenever the trial shall come on, it shall, as it must be said, that there never was a trial less tinctured with persecution than that of Aaron Burr: that he has had privileges which never before were extended to any man. I rejoice that he has had those privileges; and, I wish them to be extended to him throughout the investigation.

Sir, is it material that I should trouble the Court with another remark? Was it necessary that I should have, even with any? But I will ask—why has the prisoner made this motion? Is the course of justice obstructed towards him? Has he taken out any subpœna, on any witness, and gen. W. has dared to prevent his coming? I cannot but think of the strange way in which justice has been obstructed in this case. How obstructed? by stopping witnesses? No? but by bringing them here. It appears that this man is an important witness; and, with this discovery, what man would not have done as gen. W. did, who had the good of his country at heart? What patriot, but would have voluntarily made an affidavit of his importance, who heard from the witness himself, what he did? I believe it to be very material, if he will disclose all he knows.

Then why all these motions? To be sure, the other day it was strongly hinted, that this was but the beginning of motions. Next I suppose, we shall hear of a motion to affect Mr. Perkins, for taking up Mr. Burr. Indeed, this would look something like a straight course; and much more in point, than that the prisoner should interfere respecting this man.

I conclude, by hoping an excuse will be granted, if, through inadvertency, I have said any thing to wound the feelings of any

gentlemen. I declare that it was far from my wish, but duty compelled me to go into the case in the way I have; and, I trust, the Court will see the weight of the remarks.

Mr. Botts. From my indisposition, the Court will be relieved from hearing me long. The proposition upon which our application for attachment is founded, is this: That illegal means, invading the privileges of a witness—tending to a corruption of the evidence—and materially affecting the justice and dignity of the Court, in the present prosecution, has been practised by gen. Wilkinson, within the jurisdiction of this Court, so as to subject him to the process of the Court.

The first means used to obtain his main object by gen. W. which demands the serious attention of the Court, is the rifling of private papers, by unreasonable and illegal search. I never think on this subject, without having my feelings much wounded. When it was mentioned for the first time the other day, I thought that every honest mind ought to feel horror at such an indignity; and, that every bosom ought to heave with resentment. I was struck with the impropriety of making so heavy a charge, lest it should fail of proof: but the moment that proof was made, the mind was lost in the immensity of the circumstance. In Great-Britain, it is considered as a violent outrage to violate the post-office, and subjects unto a severe penalty. Lord Camden speaks of it in this light: even in revolutionary times he sets his face against it, and denounces it. By all the Judges of England, it ever was considered an illegal practice, which no state of things could justify, that a man's papers should be withheld from him: private papers have always been considered as a man's property, and that taking them from him, partook of the nature of making a man give evidence against himself, which the laws of the nation ought to revenge. But new times, and new laws have crept into this country. However, there are still the constitution and laws of the country in opposition to this invasion of our rights. The laws have recognized the right of private, as well as of public papers: and thus the Post-office is guarded from innovation by the most severe penalties.

The next crime chargeable, is the attempt to extort testimony illegally. I know not which is the worst in point of moral rectitude, this or the former. It is a peculiar and essential quality of evidence, that it should be free and unbiassed: but this quality is lost when it is extorted. If a question was put to a man, whether he would rather die or give testimony, we should immediately be struck with the turpitude of such conduct. Nor less ought we to be in a case, where an insidious attempt is made to get a man inveigled and ensnared into a kind of compulsion to give testimony. Here is a man who is said to be artfully addressed by gen. Wilkinson; favours proffered to him, and services at his command. For a great man like him, to descend from his high pinnacle of honour and popularity, to use familiarity and even kindness to a man like Mr. Knox;

to make him an offer (out of the public purse) of 150 dollars; and at the same moment to enter on the object, that evidence was wanted from him, seems to me to speak that the author of this attempt would go very far: and particularly, if we look to his subsequent conduct in this business. It would not be to be wondered, if he extended to any lengths for the sake of extortion. He is found interrogating this witness, who was also interrogated by Judge Hall: all of which was taken down on paper, or as much as suited their purposes: for should the witness have said that he knew nothing against the accused, but a great deal in his favour, it is passed by; and even what evidence has been given, is distorted so much, that the witness would not own it. These papers, in the form they are taken, are exhibited to the Attorney of the United States; who has an immence bundle of them, now ready like daggers, to meet the witnesses whenever they may come to your bar. Let the witness be about to speak what he has said before, and what he supposed was in this affadavit; let the Attorney hold up this terrific paper to his view—it says at once, "If you go a step out of this paper which you have signed, perjury is the consequence, and your ears shall come off." Now, Sir, I want to see this practice justified, if it be possible, by the gentlemen. Where can they produce rule or precedent, wherein the Attorney was permitted previously to forestall evidence as he should choose. I will venture to say, it cannot be vindicated; and that upon the authority of themselves, that taking testimony in this way, must be wrong.

The next thing is, the invasion of the privilege of a witness, by forcing him to do what he ought not to be forced to do; and transporting him to a great distance, without his consent: which is arbitrary and illegal. The fact is, these things came out, not by Knox, who was announced at a very early period of this examination to be a perjured man, but by the evidence of a most respectable gentleman. Without the imputation of a cime—in a time of profound peace, when no fear could be apprehended—he was taken up, and put to the alternative of going to prison, or entering into security. It was of a Sunday that he was carried before the Judge for this mock trial. He is ordered to prison, where he gives two securities in the penalty of 500 dollars for his appearance the next day. He appears—tells his tale: the instant it is closed, he is remanded back to prison, with felons and negroes. He stays there three days; when he is taken out by a military power, and forced on board of a ship, by which he is transported to this place. The transportation of offenders upon former occasions formed one of the constituent parts of that very system which brought about our revolution. In 1769, the people of this country began to feel the presure of its evil; and in that year the Legislature of Massachusetts complained to Great Britain of the transportation of their felons to this country. In all the petitions and remonstrances made to the throne, transportation has always been represented as an evil not to be endured, but as arbitrary in its nature. In the declaration of rights, and the pream-

ble to the Constitution, we find that the great functionaries of that day, paid their particular attention to this subject: but now we have arrived at a period when, instead of its being considered as grievous for offenders to be transported, it is considered to be praiseworthy to transport, even a witness, who is no offender, as was the case with poor Knox. The sun rises and sets: Gen. Wilkinson drinks his coffee in the morning at his ease: his dreams of equality are over! Mr. Knox is imprisoned and transported, without even the means of shifting himself! But this was all extremely right; this usage was mild, when coming from a great chief, who used to make many a man tremble for his expected fate. This will be a sad and mortifying triumph to the view of those who live beyond the water, and who have treated the idea of republicanism with derision, to observe that such things as these have been committed by a man, who, in trying times, it is said, devoted himself as a signalized patriot of his day: that now he should be charged with tyrannically executing what he once denounced! Perhaps it may be a warning to teach us the feebleness of that system of government under which we have so much prided ourselves. Upon this subject I feel the more, because I have had the honor of going along with the gentleman in fact, as well as in profession of principles. I feel the scourging which liberty has received by such conduct. I see the revolution shorn of one of its brightest beams. The security under which we imagined we rested, is shaken; and that government which we wished to be so highly famed, and which I trusted would be handed down, unspotted, as a wonder to posterity, must have such a foul blot upon it! Sir, it was not merely the little circumstance of robbing the Post-office; of robbing the citizens of their liberty in this instance; or of extracting testimony in this instance, that fired my most ardent opposition: but it was a justifiable anticipation of what consequences may flow from such liberties. I rejoice to believe, that such actions as these do not characterize our duly appreciated administration: it was impossible that they should have known what was done, and therefore we cannot harbor a suggestion of their participation; but let not this thought make us more easy under the circumstance, lest it should be a precedent for some other petty tyrant to enslave whoever may fall in his power. Sir, it matters not whether the man was detained in prison 3 days or 3 years: whether he was transported to Richmond or to England: It is enough that he was deprived of bail, and committed. If one man might be so served, so may more. The nature, and not the degree of the circumstance, demands our attention and caution.

I could not but remark a word which fell from an apparently very respectable young man, Mr. Gaines, who said that Knox was sullen when he was on board. And well might he be, when deprived of every thing, and dragged from every thing to a very distant spot. This Mr. Gaines was surely worthy of a better fate, than to be the scape-goat of this unusual, and unconstitutional business.

It was just at the time when this seizure of Mr. Knox was made,

that we heard of Gen. Wilkinson's parading into Court day after day, in the style and magnificence of a Nabob, displaying to the Court the plenitude of his power. But here, knowing that he had soon to appear in the heart of his country, he avoided every immediate interference; and on the contrary, assumed a fawning civility to Mr. Knox, and more freedom than was usual with him. He sat himself about schemes: he became the inventor and mover of the mischief, which he set Mr. Gaines and others about to perform. That he was first in it, we find by the testimony. He first found out Mr. Knox: he examined him in the camp. He made affidavit, by which Knox was arrested and thrown into prison. He contrived to set one of his subordinates to execute what he had schemed, under the denomination of a Deputy-Marshal: without oath, without bond, without compensation: and in order to execute this, we find the military chest open. They travel together in a military ship, quite under the command and direction of this military chief. This is the man whom Mr. Gaines declared he should find himself under obligation to obey, and be at his command. Now could Mr. Gaines have come here without liberty? Was he not directed to act as he did? Or otherwise he would have been responsible to his commander. Could Sergeant Dunbaugh have acted without superior authority of a military nature? If Mr. Gaines is to act in this double capacity of Captain and Deputy-Marshal: if he is to have a military deputy also, (a deputy of deputies), I want to know how he could have put such contempt upon his military rank, without licence from his superiors? If he was really and *bona fide* a Deputy-Marshal, he must have obtained permission. It really disappoints my expectations of Gen. Wilkinson something, to see him capable of transferring his crimes to one of his military officers. I am sure that gentlemen must see what a cobweb has been woven to ensnare, not only Capt. Gaines, but all who were so unhappy as to fall near it.

We next find this great puppet-master exhibiting his scheme of being upon bad terms with the Judge: by which he is able to carry on the farce, by keeping himself hid from view, and all the transaction is conducted by the civil power! We cannot be denied the privilege of thinking about this subject.

But it is at least insinuated, that the circumstances being imperious, created a sort of necessity. How can necessity create a crime, a crime of so deep a die, that nothing ought to save it from exemplary punishment? Shall citizens be deprived of their liberty, and be at the pleasure of a despot, upon the excuse of necessity? When a compliment was paid, by this gentleman himself, to Gen. Wilkincon, I could not but think that I saw a smile where a groan ought so have been. It was indeed the ghastly form, taken of that portion of nature, which seems to affect the countenance at the moment of death. Perhaps he felt its force.

The gentleman last up, said it was a severe law, that the sins of the father should rest on the children: and I say that it is wrong

indeed, to suffer the sins of the General to be put to the account of the subalterns. I never did expect that it would have been attempted at this bar to have justified the conduct of the General, because he did not appear immediately in the act; although it was well known, that he was the fountain of all orders; and, indeed, of every motion of his officers.

I was really sorry to hear something which dropt from Mr. M'Rae, respecting the peculiar and unusual privilege enjoyed by Col. B. during this examination: he added, that all this was right, and he wished him a continuance of it. But really, Sir, this is not the language of those who act with that gentlemen; nor do their actions correspond with the sincerity of the declaration: Witness the opposition which every application for a privilege meets with, from that side. When we take a review, we must consider such an expression as rather calculated to feed a flame, than otherwise.

An objection contended for, as to the jurisdiction of this Court, merits notice. We need only answer this by quoting the 14th sect. of the judiciary act, which gives a power in this Court to issue all writs, necessary for the perfect exercise of its jurisdictional powers. And another section authorizes it to issue all writs of subpœna to any part of the United States. The power to issue an attachment must, therefore, be co-extensive with its jurisdiction, whether it respects time or place; and therefore, for any unlawful use of a process returnable to this Court, committed in New-Orleans, this Court has a competent power to punish. But this outrage, be it observed, continued even to the arrival within this State: for he was brought as a prisoner to this State. To be sure, he might have jumped overboard if he had liked; and that was the only way in which he could have escaped. But after he came to Hampton, an insidious attempt was made to extort from the witness, an acknowledgement of the civil authority of Mr. Gaines. I realy pity the condition of a military officer, who must be the blind subservient of his superior, in whatever commands may be imposed! I was much pleased with the candid testimony of that gentleman; and I am sure that, had it not been for the controuling authority by which he was guided, he never would have been the instrument of such severity: he did not act from the impulse of his own mind. I should be glad to know what is the meaning of that law, which says that a person shall be at liberty from the time he is summoned, if he is to be at the mercy of any one to imprison him, and to transport him? Is it congenial with the spirit of our laws to be thus deprived of liberty, and sent off without a shirt to put on? If this is consistent with law and justice, then we will join the gentlemen in saying, that Gen. Wilkinson deserves well of his country.

There are two authorities on contempt of Court, which I shall offer with comment: Supplement to Viner's abridgement, p. 225; and 3 Hawkins, p. 275.

THURSDAY, June 25.

Mr. HAY. Although propositions have been repeatedly made to the gentlemen on the other side to close the argument, they are determined to proceed: But how do they proceed? They do not tell us what is the offence for which this attachment is moved.—Was it for sending the witness here? was it for taking notes on the examination of the witness? was it for "plundering the post-office;" or, what was it for? All these things are introduced into the gentleman's arguments, as though they were so many points of contempt of this Court! I must suppose that they were afraid to specify the act which was committed. They did it not, because, that if they had pretended to have explained the doctrine of obstuction of the process of this Court, or the contempt thereof, it would contain in itself evidence of its own fallacy. It would have been seen, in a moment, that no such offence had been commited. All they support their argument by, is vague and unfounded declaration, in order to get at the public ear, by producing every minute and prejudiced relation of the conduct of Gen. W. which they can discover, and then clothing it with their own inferences. Irregular, however, as this has been, I believe, that a fair and candid examination of the facts will satisfy—not only this Court—not only this audience—but all those who may ever hear of it, that this motion has no foundation in Law, Reason, or Justice. We admit that it has some foundation in policy.

Before I enter into an examination of this most extraordinary motion, I cannot forbear asking by whom it is made? I cannot forbear expressing my surprize that it should be made by the prisoner, whose Counsel have pressed the subject upon us at every possible avenue before!

What is the offence alleged? *Contempt of a Court of the United States, by obstructing its justice!* I must ask again, who alleged it? The Court never thought of it. And I will venture to say, that if it had heard the evidence of Knox ten times over, it never would have even dreamed of contempt. Is it made by the officers of the United States, whose Court is said to have been insulted? Not such an idea ever entered their heads. Nor is it brought here by a man who is injured: Mr. Burr is the man: and he cannot say that he has been injured by Gen. Wilkinson bringing witnesses before this Court to appear against him. This he will not do. Besides, this man was one of his own associates. And as Mr. Randolph has hinted, he left his wife, children, father, mother, friends, (if he had any such), and put himself under Mr. Burr, and with him hazarded his fortune. From what motive then, is it, that Mr. Burr has brought on this motion? The answer is obvious. Not to clear away this obstruction to the course of justice, which has been produced by the improper conduct of Gen. Wilkinson; but to make an impression on the public mind, that those who may hearafter try this case, may be led to believe that the credit of Gen. W's. testimony merits the animadversion and strict scrutiny of the

Court: thus to dam up the course, and obstruct the progress of the trial in that way, that justice shall not be done: and that any preparatory motions which I may make, shall not be heard.

Judge MARSHAL. Sir, the Court will give ear to any motions which you may have to make. This motion, nor any other, will obstruct any one which you may please to make. This must give way to any such.

Mr. HAY. I shall take leave, Sir, to speak something of the evidence given by the only witness who was introduced in support of the motion, (James Knox.) He says that Gen. W. sent for him, and that he conversed with him very freely about Mr. Burr and his plans, as he would be a material witness at the expected trial. Knox wanted money. Gen. W. knew that if he was summoned on the part of the United States, he would be entitled to money. He says, that Gen. W. offered him money to tell what he knew. Now this was only his conjecture. It might be true, however; and if it was so, it was very properly done. The witness says, that he was afterwards arrested, as he understood. He was, agreeable to Gen. W's. affadavit, carried before Judge Hall, committed to prison, &c. &c. He says he answered some questions, but declined going through with his evidence before Gen. W. who has been called a military despot. He was perfectly at liberty to give his evidence; and although he appears to have had a strong inveteracy against Gen. W. yet hes ays he never used threats nor promises with him: And yet this is what is called an extorted affidavit! Now admit all this man's story to be true, and him impressions too, that he was brought here by Gen. W.—(mistaking as he had done, that as a military com mander, he thought he had a right to do it; and even Judges have sometimes mistaken their powers)—suppose he even came here and told the Court that he had brought this man: could this be called a contempt of this Court? It might be an illegal act; for which, perhaps, this man might recover damages; but surely the witness would not take such a method.

There is one species which might properly be called a contempt of Court: Suppose a man was coming to Court with a subpœna in his pocket, and he was to be stopped in the way, and told that he should not go.—In that case the streams of justice would be corrupted, and it must be punished. Now, if the Court would punish a man for stopping a witness; could that Court, with the same breath, punish a man for forwarding a witness to Court? I think no person would hesitate to say, that the man who prevented a witness, ought to be punished; but principles of common sense would forbid the punishment for the other. This is conclusive as it respects Gen. W. and the doctrine of *contempt*, even allowing the greatest latitude possible.

But, Sir, what is the real state of Gen. W's. conduct, as disclosed by the intelligent testimony on the other side? Why it maintains his innocence so strongly, that all the force of the other testimony, if ever it had any, dwindles away, until not even a shadow is left

behind. The ground of this attempted odium, about which so much trouble is taken, is this: Mr. Gaines was requested by the Attorney-General of the United States to issue subpœnas; but Gen. W. being on the spot where this great explosion was to break out, knew better than any other man, who was acquainted with the particulars of it; and, therefore, the Attorney-General, after transmitting the names of all that he knew, left it to Gen. W. to fill the rest. Amongst the rest, Mr. Gaines was requested to serve one on Mr. Knox, who has told Gen. W. several things; and, though he did not tell him all, he thought him to be a very proper, and important witness. It was enough, if Gen. W. found any man who came down with, and was in the party of Col. Burr, to make him swear that man to be a competent witness. This affidavit was taken, and the man was sent to Judge Hall. Now, Sir, a single remark:—If Gen. W. was under the influence of this diabolical design, which is ascribed to him, how came he to entrust all these important secrets to a man, (Judge Hall), that he could not, from the statement we have had, expect to be very favourably disposed to his interest. Well: The Judge issued his precept to bring this man (J. Knox) to Court. The man gave no security: the Judge deliberated on the subject, and examined the law of his country. He expressed his unwillingness to act without counsel. But, after all, he thought it was his duty to confine, or secure the attendance of the witness. He committed him, (not to military care), to the Marshal: And here is the warrant (shewing it) which authorized Mr. Gaines to act as Deputy Marshal.

[This caused some unimportant conversation about the warrant.

The character of Judge Hall was next brought up, by Mr. M'Rae, who spoke of him by respectable information, as a gentleman much esteemed in his circle, and in the country generally: of which he could give ample testimony.]

Judge Marshal said, that the Court did not want to go into Judge Hall's character: not a word was said about his character. As he was not here to be heard, his character could not receive ample justice.

Mr. Wickham. We do arraign his character in this particular instance.

Mr. M'Rae. I want to prove that he is incapable of acting as the gentleman says.

Mr. Botts. Perhaps I was the person who spoke so much of Judge Hall: not of his character, for I know nothing of it; but of his actions. I still am of opinion, that if a counsellor in Virginia should give such opinions as Judge Hall did in this transaction, his licence ought to be revoked, and perhaps his person committed. I do not know the gentleman; but, I understoood from gentlemen of veracity, that he is a man of a fair, good character.

Mr. Hay. It is not my business to vindicate Judge Hall: I do not see it necessary in the present case: and the gentlemen may employ all their ingenuity, or whatever they please—they may put

him in "dust and ashes" if they please; but, unless they can prove that he and gen. Wilkinson were common confederates in these transactions, it cannot effect the present motion.

I said that this Judge had committed Knox to the custody of the Marshal of the district, whose deputy was Mr. Gaines. The warrant was under seal, directing him to take this man and bring him to this place. The power of the Marshal being transferred to Mr. Gaines, he executed it: he took him on board the vessel with himself, who was also a witness. It also appears that gen. W. instead of manifesting that contempt which has been the subject of so much complaint; fearful that a young military man might do something wrong in a business to which he had not been accustomed; recommended him to apply to the Attorney of the United States, and another Counsel, for advice. This circumstance has been very much misunderstood. I deem this of importance, because I am satisfied that gen. W. had not, at that time, the least idea that what he was then doing would be a subject of accusation. He surely could not think that Mr. Burr, who was brought here as a prisoner, would employ himself in making charges against him. Indeed if he had seen what would come, he might have shielded himself; but as it was impossible, without inspiration from above, to even guess at it, he acted as he did. Now, what was he to have done? If you look to his situation at that period, Sir, you will find that he was threatened in New-Orleans by traitors without, and enemies within. How far his conduct was justified by law, is not my province now to enquire. The state of things certainly required measures that might not, at other times, and in other places, be proper.

Now, Sir, taking up the subject upon the ground where it was left by the witnesses, we see nothing. A gentleman said, that it was the interest of gen. W. to destroy Mr. Burr, and that his own salvation depended upon it. Well, be it so: What does he do? He has done nothing for which he ought to blush. He obtains a few blank subpœnas from the Attorney-General, which he fills with the names of witnesses that might be essential in the case. Sir, I ask the Court—I ask the world—whether this is wrong? Every thing that he did, stopped at the moment of the affidavit; and all afterwards, were the acts of the Judge and Mr. Gaines. Do the witnesses blame gen. W. for this? No, Sir, they have too much respect for truth to say so. Do they say that the civil and military powers are united? Where is the evidence to prove that the Judge has violated his oath, and prostrated his judicial character; or violated his private character, in order to unite with gen. W.—with whom, we find, he kept up no intercourse? We have strong evidence that this union was highly improbable. I should have been very glad if Mr. Randolph had pursued his argument, and shewed wherein the connection subsisted. But he never deigned to tell the Court, even the ground upon which he denounced gen. W.

Gen. Wilkinson has certainly done right. Why, Sir, even Mr. Knox, whose voluntary communication has produced this motion, has no right to complain. If I am right, I do not believe he could have an action, even if he were to bring a suit for false imprisonment against gen. W. Wherein could damages be found? Now, if there could be no action, there can be no contempt. But take another view of the subject, and how strongly does it appear before the Court? Mr. Knox was summoned to appear here as a witness. Now, suppose he had not came, Knox himself would have been liable to an attachment: This process could have issued for his not obeying the process of the Court. And yet gen. W. is to be attached for bringing him! Is not this blowing cold and hot with the same breath? Where is the reason or common sense in this?

It is somewhat singular, that, when these gentlemen addressed the Court, one of them should not have furnished the Court with some specific crime that had been committed, and have pointed out the law which designated that crime. Viner 442, to be sure, was glanced at by Mr. Randolph; which says, that a contempt is to oppose the dispensation of justice by a Court: but is there an instance stated or pretended in this case, where the justice or authority of the Court was opposed? 2 vol. sect. 26, also explains the doctrine. This is sound law, but the fact here is not applicable. Preventing or inducing a juryman to stay away from Court, is undoubtedly a contempt. So any man who writes a ficticious letter to prevent the operation of a legal adjudication, is certainly guilty of a contempt. 4 Blackstone, 283, says, a disregard to the authority of the Court is a contempt. I think I may safely say, that Blackstone has treated so fully on contempt, that whatever does not come under some part of his definition, ought to be disregarded. The act of party against party, the Court scarcely ever takes notice of; except by some particular feeling, they stretch the doctrine of contempt too far. Contempts in England have frequently occurred, and yet we cannot find one any thing like this. But in this country they occur seldom: I have never heard above two instances. Is it not extraordinary that the gentleman should move as he has done; when the English books do not, in the slightest degree, bear him out?—And much less does the American practice. I will venture to affirm, that no motion was ever brought forward in Great-Britain or here, to charge a man with contempt for forwarding justice, by bringing a man to give evidence. But I deny that this witness was so brought. Is there one single circumstance in Gen. W's conduct, (whether real or imputed), that, according to the doctrine of Blackstone, can in any way be supposed, or turned, or even screwed into contempt of the authority of the Court? There is not.

An attachment is a summary proceeding: the case is clear. A man is brought before the Court, and the case is done—except there be long speeches, as in the present case. But this kind of usage is not congenial with the spirit of our laws. I do not say that it is a so boldly.

power that ought to be destroyed; but, I think it is a power that ought to be very cautiously exercised, only upon the strongest necessity, and not upon any doubtful case. The reasoning upon this you will find in 1 Bacon, p. 181; and 4 Hawkins, 286. The Court ought not to stretch the doctrine as far as it can be stretched, but ought always to keep within the limits of sound policy.

The doctrine of contempts extending no farther in England than they do, shall they be increased here, in order to enlarge our burdens?

I will mention a case, to shew with what degree of caution it ought to be exercised here. In Fredericksburgh, some persons were brought before the Court upon a charge of murder. The case was examined, and I believe they were bailed. The Grand Jury found a bill. The men being in Court, the Judge told the Jailor to look to them. He did so: but that was all, for they went away. Judge Tucker thought this was a contempt. However, they came there again the next morning, and that was the plea the Jailor made. Recollecting this, and viewing the British precedents, the other Judge who had not declared his opinion, summoned a Jury, and the man was cleared.

In England they have no fixed Constitution to afford them written precepts, and certain rights to the subject—but we have. The 7 art. of amendments, 2 clause, I recommend to your notice, Sir; not as precisely applicable to the case now before you, but to shew that liberty ought never to be approached, but with the utmost respect and caution.

As to the law, I extremely doubt whether attachment can go against Gen. W. while he attends here as a witness. He is this moment under the authority of the Court, and obliged to attend. I think that the law respecting the United States' Courts is the same as under the State authority, and has been uniformly so understood. Now this immunity is made in 278, and 122 of the Virginia code.

I really did not believe or suppose, when there appeared such strong solicitude to bring on this motion, and such eagerness to attack Gen. W. that the Counsel would have come forward upon such feeble, trembling ground, as that on which he appears to stand. He began by saying, that suspicion was a sufficient ground. What was this but a plain, direct authority, for us to suppose that he had no evidence? I could scarcely believe it to be so; but the result proves it; and I must express my surprize, that he should trouble the Court with his suspicions! Sir, I think this is one of the last cases in the world that can be supported by suspicion. Suspicion might be enough to establish *probable* ground: a man is arrested upon probable ground: but, when the party is here in the power of the Court, it is an infraction of human rights to rest on so slender a basis. A man must be tried upon facts, and not on suspicion. If trial may go on suspicion, I should be glad to know what basis you would rest upon in a rule to shew cause. Black-

stone says expressly, that the rule is made upon affidavit, founded upon the principle to shew cause; and afterwards, if an attachment is ruled, then it goes. I am wrong, however, in expressing my surprize that Mr. Randolph should have rested on such poor ground; because I must do him the credit to say, that it was the very best he could find to stand upon.

I knew very well for what purpose this motion was made; for (to use a very homely expresston), Mr. Randolph "let the cat out of the bag," soon after he made it. He told the people about the awful union of the civil and military authorities. To be sure, very few people like even to have the civil authority chained to them; but, when they are united upon them, it is time for them to be frightened. When such a surprize came from a man of his knowledge and years, people may think it never was known before. Why, Sir, the civil and military are united by the Constitution itself, in the President of the United States. He is commander in chief of our civil and military relations. That Constitution which we all revere, and which we have sworn to protect, contains this doctrine. And so does the more humble government of Virginia; and of many, if not all of the States. Yet we are to be alarmed; our liberties are at stake, by this dreadful appointment of an officer in the army to a Sub-Marshal. Mr. R. is a politician. Now, he must know, that it is to this union in our government that we owe our liberties—not only in their origin, but in their preservation. I think that if these two offices were distinct in our chiefs, we should soon see the military triumph over the civil institutions. But, Sir, suppose this was wrong, and that Mr. Gaines was wrong in the exercise of it, of what consequence would that be to gen W? He did not know the circumstance, so Mr. Gaines swears, until the Judge offered it to him. Unjustly as gen. W. has been charged in many instances, he might well bear the addition to his load without shrinking.

But Mr. Randolph said he was no Deputy, because he did not give a bond. Sir, he is not required to give a bond: the Marshal's bond is enough. He, as principal, is authorised to employ as many deputies as he may have occasion for, and Mr. Gaines was one; who says, that all he did after this, he considered to be by virtue of his civil, and not of his military authority. But the word "military" is a very formidable word in the ears of those who attend Courts of Justice. It is very common for us to regard with great weight, those parts of a relation which are in our favor; and disregard, or forget those which are against us: and so it is with Mr. Randolph: for he cannot see Mr. Gaines, only in his military dress. It is true, he was a military man; but he brought the man here under his authority as Sub-Marshal. He produces to you the deposition and order of the Judge for removal, which vindicates his civil authority. But if all were as represented, still gen. W. is not responsible; and even if he was, he would not be

to this Court: for the crime (if a crime), was not committed within its jurisdiction.

Another thing said by Mr. Randolph, was: that as there was an incorporation of actions betweeen gen. W. and Judge Hall, in the taking of the affidavits—so that if Judge Hall acted illegally, gen. W. was responsible for it by his coincidence in it; and which was a proof of their farther connection. I will not trouble the Court with any animadversions upon this, Sir; because it is necessary for the evidence to be produced, that will prove this incorporation of action. No such has appeared. Suppose that gen. W. had gone before Judge Hall, and made affidavit that a certain man was a material witness—does this make gen. W. to blame for any subsequent illegal acts of Judge Hall? Now I will suppose that *A* goes before a Magistrate, and swears that he has lost certain papers, which he believes to be in the possession of *B*.—The Magistrate, not understanding the law, instead of issuing his search-warrant, issues a warrant to take up *B*, and puts him in jail.—I will ask, whether *A* is responsible for the error of the Magistrate? This doctrine cannot be maintained. I cannot say it was so particularly advanced, but it was strongly insinuated in the argument.

But says Mr. Randolph, gen. Wilkinson was commander of the vessel. This is contradicted in fact; for the commander of the vessel is proved to have been Franklin Reed, who had a commission for that purpose; and although the raval forces at New-Orleans were put under the command of gen. W. at a certain time, yet he had no controul over this vessel at this time. It was naturally to be expected that he should give a passage to the persons who were witnesses, because he was persuaded by the government to take his passage in this vessel; and he undoubtedly wished such witnesses as were there, to come along with him. This same disposition he manifested after he got to Hampton; for, judging that it would be expensive to the witnesses to come up by land, he procured a vessel for them to come up. This, Sir, ought to operate to his credit.

Mr. Randolph also says, with increased elevation, if these affidavits were not to be used by military authority, why were they sent to gen. Wilkinson? Now, Sir, I must confess that I have not heard of any having been used with military authority. I know very well the object of them; but it seems to be supposed, that they were intended to take up all those to whom they were directed. But suppose this was correct: suppose the commander in chief received all those subpœnas under this direction—what was he to do? Why, if we are to believe his character to be what has been represented, we should have seen him instantly calling about him his Jannissaries and his Mamelukes, and sending them through all parts of the city, in search of these poor creatures who had the misfortune to be witnesses! and, lest they should not collect enough, to bring the poor, innocent, trembling citizen—clap him

on board the ship, and "transport" him. This Sir, and worse, any man must have apprehended, if they were to believe Mr. Randolph's picture of the horrid scene. Well, what does this Sovereign of the West, with his unbounded power? Why he gives these subpœnas to Mr. Gaines, and tells him to advise with gentlemen of legal knowledge how to use them.

Now, Sir, do gentlemen really think, that with this false colouring of a circumstance, which is nothing in itself, that they make any impression on the public mind favourable to their client? Certainly they are mistaken, if they do.

But Gen. W. is guilty again, because he ventured to ask Mr. Knox, (the witness), if he was not afraid to see him, after what had happened. After what? After I have been guilty of such arbitrary conduct? What right have we to put this construction upon it? No, Sir; I will venture to say, that the meaning was this:—Are you not afraid to see me—you who have come down the river with Burr, and been a partner in his adventures? Surely gentlemen must be driven to a great necessity to put any other construction on the words.

Next Mr. Randolph says, that Burr and Wilkinson are antipodes to each other. Indeed they are: this is doubtless true: but in what sense they are, I need not trouble the Court now to explain. He farther says, that it is the object of Gen. W. to ruin Burr: he knows that he himself must perish, unless the other falls. I should be glad to know how this fact is ascertained. We have been charged with diving too deeply into the thoughts of others; but really Mr. Randolph has gone much farther than we could possibly venture to go, without hesitation. When he undertook to describe to Gen. W. that his reputation depended upon the ruin of Mr. Burr, his observation was not correct in fact; and, I do not believe, that it is seriously entertained by any one. I will not pretend to return the charge, nor can I express my surprize at his making the charge; because the manifest object which they have in view, is, to beat down the reputation of Gen. W.—but this they never can do; and every step they take in it, must be to the injury of their own client.

I really think, Sir, that all the arguments of Mr. Randolph are so weak, that if they were entirely passed over, the effect to us would be the same. I am tired of following him any farther, except it be to examine some of his law-positions. He said, that there were two positions in which this subject might be viewed as a contempt of Court. One was—"That every degree of force employed upon a witness to swerve him from the right, was a contempt of Court." Now, Sir, what can he do in the present case, to apply this principle, and yet discover a contempt? He is obliged to cram down the throat of the witness, every thing, in order to come at this; and yet, not after all, obtain his wish; for the witness says, that there were no attempts made to swerve him: but that, in fact, he was treated with politeness. Much fault has

been found with the act of taking this witness into custody, and bringing him on board of a ship: It merits not that censure. If a witness evinces reluctance to go to the place where a trial is to be held, force must be used. This the law allows; and there was nothing done in this case, but would have been done with any one similarly situated. But whether the position be a correct one or not, is immaterial in the present case; for we must recur to our old and unanswerable excuse—it was not applicable to Gen. W. because it was not him that forced the man to come; and if he had, he would have done right.

It is said by Mr. Randolph to be a most dangerous power to be possessed by any government, to extort *ex-parte* evidence, as though Gen. W. was responsible for all the illegalities and improprieties that were used from the mouth of the Mississippi to the falls of the Ohio. Mr. Jackson took a great many affidavits, but Gen. W. did not take one: all that he did, was to take notice of such evidence as he could obtain from this man; and these notes were taken merely to satisfy his own mind, whether or not he would be a competent witness. I do not know that he ever formed an idea of taking an affidavit. I know nothing about it, more than the evidence speaks.

But there was one observation about the exertion of corporeal force used to a citizen of the United States, who was thrown into prison, transported, &c. "for the crime of being a witness"—and all this at the instance of Gen. Wilkinson. Now is it not surprising, Sir, to hear a man so experienced as Mr. Randolph is, gravely making use of these expressions to the Court, as though the Court had no understanding of the law, or of the facts. The Court know, that it is the business of a Judge to recognize a witness; to commit him in failure of that recognizance; and to transport, either by land or (if he should see fit), by water, to the place where the trial is to be. But, Mr. Randolph after introducing this pompous enormity, says, that all this was at the instance of Gen. Wilkinson. But what of all this. I will ask, whether the whole of it, in the smallest degree, amounts to a contempt of this Court? But, superadded to all this long catalogue of complaint, it is with the utmost solemity pointed out to you, that a citizen has been transported, &c. in this free country; transported 1200 miles; and that for (not violating the law,) *the crime of being a witness!* Well: allow it was for that "crime," and what does it amount to? Why, Sir, to a definition of a principle—That a witness may be bound to attend to give testimony, if he will not do it voluntarily. And is it not proper that it should be so?

The next observation was urged with the same degree of seriousness, (for the gentleman seems to tremble for the public good), when he fancies he sees the prostration of all our rights and independence; when with uplifted hands, he comes to tell you of the military sport that was transacted. And, if it was merely sport, why should he be alarmed? But, what was this military sport

which he so seriously denounced? It was, that a military commander asked some questions of a man respecting this affair; and because he thought him so, he made affidavit that he believed him to be a good witness. And further, it was that another military man, clothed with civil authority, served affidavits; and under the orders of a Judge, brought the same witness to this place. I really am not surprized that the gentlemen should have digressed so much in their observations, and forced in so many extraneous things: seeing they had so very small a compass to move in.

The robbery and plunder of the Post-office is brought in as a serious offence. Now suppose it was done, and by Gen. W. If he has committed an offence, let him be punished for it; but, let it be in that way which the law prescribes. This is not the place, nor manner, in which that question can be examined. But, Sir, did Gen. W. do this act? Let it not be put to his account, if he did it not. Why should every act, of every body, be fixed identically upon him? It is certain that he could not be every where, and engaged in every thing.

I am weary, and I think the Court are too. I take my leave of this subject, trusting that, upon the evidence and rule of law, the Court will pronounce right.

Mr. WICKHAM, after some introductory strictures on the manner pursued by Mr. Hay in the introduction and application of other gentlemen's arguments to suit his own purpose, proceeded to say, that it was to the Court, and to the Court alone he meant to address his observations.

The gentlemen on the other side, Sir, seem to insist upon it, that we have made no specific charge; but, I do not understand what they mean by a specific charge, if we have not. It may be, because our arguments have not so much weight, as they ought to have with those gentlemen. It is hard to conquer prejudice. Sir, our charge is this: I beg leave to repeat it:—That there has been acts, in the highest degree illegal, done by Gen. Wilkinson, under a colour of the process of this Court; by which a witness has been dragged, ignominiously dragged 1200 miles: and, for what crime? For the crime of being a witness. Now we suppose this process to be altogether void, because it was not legal. We say, that calling upon an officer to make out an instrument, not legal in form nor in substance, and that insrument being made to operate, is a contempt of the authority of this Court, and one that must receive immediate punishement; provided that we bring it home, and fix it on Gen. W. which we think we can do. Another circumstance that has been mentioned by us, is the Judge's warrant, which we shall contend is illegal and void. Now an illegal warrant must be void: it can be nothing to a person who has it, nor compulsory to one who is served with it.—This adds a strong feature to the act of Gen. W. Another thing we shall contend for is, that in all offences, whether high or low in their nature, every person guilty of

participating in an illegal act, is equally chargeable with the offence? These are plain positions, which cannot be contradicted.

The next and sole question in this case, is—whether this was procured, aided, or assented to by gen. Wilkinson? If it is proved to have been acquiesced in by him, he is guilty of the contempt. I should not have thought that the gentlemen would have bent all their talents to this single point, in order to have proved gen. W's innocence. We admit the guilt of his inferior agents; but not choosing to rely solely upon that, we go farther into the scrutiny. Indeed, the guilt of these agents is nearly admitted by the gentlemen who oppose us. They censure us too, for bringing forward the motion, by saying that we have no interest in it. Sir, if an officer of the United States, whose Court is said to be insulted, does not choose to resent this insult, but take part with those who sap the foundation of justice, is that a reason why the individual injured should not? But again, Sir. It is the Court of the United States—it is the Court of every man, who chooses to come forward and make complaint of any injury done to him. It is the interest of every man, to see that the fountain of justice flows clear and undisturbed. But what does he complain of, they ask, that he is brought here to tell the truth? Yes, Sir, I believe he has already told the truth: He told the truth in what gen. W. exacted from him, however he may have set it down: and he has told the truth as to the usage he received. Is it of no consequence to him, that he is dragged here as a felon? Must this have no operation on the human mind? If this man had strong nerves enough to encounter it, such usage would shake the fortitude and strength of many. And if every man is liable to be brought here as a felon, to what a state is our system of jurisprudence reduced? Is this a way to obtain that impartial, that manly disclosure of facts, which a man not brought from a dungeon would be likely to give?

But this is not all. Were not other motives attempted? Were not views of emolument held out to him? On the one side, a sum of money, and every advantage—On the other, he was, in the alternative of a refusal, to be dragged in chains to Richmond, under the care of a subaltern, who is nothing less than a man of the party! Can it be doubted, Sir, that if this practice is tolerated, it might frequently happen? That witness who is forced, and on the other side allured, will walk in a certain path, and cannot be trusted. But what shall we say of the man who uses means of this sort for a particular end? He will not be very scrupulous himself about the means to obtain his end.

But Col. Burr ought to stand if possible, though we know it is impossible, upon the same ground as his accusers: We know he cannot. Any officer, appointed by the government, at the pleasure of the government, and who may be turned out of office whenever the government pleases, is liable to do wrong in favor of that government. If so, so much the better; but if not, we know how the bias

will be. We know that the public treasury might be emptied, in collecting witnesses who can testify against the accused, and bring them here by force to give testimony against him. But if a witness at that distance could testify in his favour, so unequally matched are we, that we have nothing but the naked process. Thus by the prosecution only can this compulsory process be put in practice. A practice which I think is unfair, and which I think this Court ought to divest them of.

But the public mind is addressed. Now, Sir, I will not waste the time of the Court in recurring back to the progress which this examination has undergone, and which has been frequently addressed to the public mind. We have been frequently forced to follow the gentleman to be sure, but generally they began in that course. But be it which side it will, I will ask, whether it was to the Court or to the the public that this part of the argument was addressed? Do they not wish to influence the public mind at the very instant they are accusing us of it?

Another remark, by way of excuse is made. Suppose, say they, that Gen. W. had done so and so, he was no lawyer. If he did drag this witness away unwillingly, at most it was only a mistake in law, and it ought not to be regarded. Does the gentleman who said this, recollect, Sir, one of the first principles of law which he learned—"That ignorance of the law, excuses no one"? Can it be supposed that Gen. W. himself is ignorant of this maxim? Can it be believed that a man of his knowledge in military and civil life, should justify himself in any way for dragging a man 1200 miles for being a witness? If Gen. W. is this ignorant man, what shall we say of the government that appointed him. Sir, the government, when they appointed him, knew that he was a man of talents. They would have known, had they been able to look forward, that if he did such things, he would do them upon his own responsibility. It is impossible to believe that any boy out of horn-book would imagine otherwise.

But, it seems, that we have been guilty of a contradiction. Suppose, say they, he had stopped the man, it would undoubtedly have been a contempt, but, how can it be so now, when has he brought him to give evidence? This is really a singular argument. Why, Sir, it may be opposite, and yet might be both wrong. Extremes are frequently wrong. It would be a strange offence, indeed, if Gen. W. had carried this Knox from Richmond to Norfolk: and yet it would have been an offence. So it would, if he were to carry him to any other place, by our law. Suppose he had brought him here in irons, and used the most savage cruelty upon him, (which perhaps he would not regard), is he not answerable to this Court for an offence, when the witness belongs to this Court as a witness?

The gentleman says, that the process of attachment has never been resorted to but upon great occasions; and, that in trivia

things, it has never been. Then he recollects that it has been sometimes used. And what, Sir, is a great occasion, if an attack upon the liberties of the citizen is not? Do gentlemen pretend, that it is a small offence, to take a man up without even the shadow of right—force him into prison—and land him 1200 miles off? Are our liberties depending upon so fine a thread as this, that any man who happens to have a subpœna in his pocket, shall have power to do this or worse to any citizen of the United States? I remember the other day these gentlemen admitted that Mr. Jefferson was within the process of this Court, and it was in vain to protect him against it. To this doctrine we heartily subscribe. We believe with them, that all the citizens stand on precisely the same footing. Now suppose instead of using the process which Mr. Burr did, to call upon the President for testimony, he was to have it served by half a dozen myrmidons, who would drag him to Richmond by force—would not this be a crime? Confessedly it would. And, surely, where can be the difference with respect to Knox? All are alike, and the right of no man ought to be wantonly violated.

What, Sir, are the facts with respect to Judge Hall, who has exerted his magisterial arm, which it is obvious was the mere puppet of gen. Wilkinson? But, say the gentlemen, he and gen. W. were at war; at this very moment there was a variance between them. And it is probable, Sir, that he was at variance with every man in New-Orleans; but, who dared to shew it? Was there no motive that could operate upon Hall? Was there not the motive of fear? Judge Hall knew well what gen. Wilkinson had done, and he knew what he could do; and when he sent to him for the process of the Court to drag a witness to Virginia, he knew that a request was a command. Observe how this transaction originated. Mr. Knox was discovered to be in New-Orleans; (and gen. W's motives for searching for testimony on the part of this prosecution are too obvious) he sent for Knox—asked him if he wanted money—behaved to him with the greatest courtesy—and asked him a number of questions about Mr. Burr: which answers he took down in writing: but in very different terms from what they were delivered. See how he amused the man first, in order to bring on this topic. Instead of going immediately into it, he spoke to him about Dunbaugh; with all of whose measures, there can be no doubt, but he was as well acquainted as he wished, and perhaps better than the man himself was. Well, after all this, we find a Mr. Gaines, a military officer from Fort Stoddart, near 200 miles from Orleans, who, in pursuance of an order from the Secretary at War, is directed, after serving some subpœnas upon persons under his own immediate command at a distance, to come to gen. W. with orders to deliver some blank subpœnas to him to be filled. Well this he has done, and somehow or other, but he does not recollect how; but they imperceptibly got out of gen. W

hand into capt. Gaines's, to be served. Gen. Wilkinson tells him that Mr. Knox is an important witness, and must summon him. Oh, no! I recollect he only *recommends* him to summon Knox. I admit the word was used; but, do we not all know what the recommendation of a military superior means? It is in fact a command. It was found that Knox was so obstinate, that he would not go; What was next to be done? He was not asked to go and consult a lawyer; but capt. Gaines was recommended to consult, in order to know how the man was to be brought here: Not to know what was right, but how to execute what was determined. After that gen. W. ordered him to go and conduct Judge Hall, to see if he could aid him in this business. He goes. The witness is brought there: he is a *little sulky*: He is thrown into prison, to cool a little. He is dragged on board by a military guard, where gen. W. is. Here it is observable that he does not order, but he authorised Mr. Gaines to take these persons in the same vessel where he himself was. After they had deprived the man of means to get his clothes, it was determined that he should have money: How is this money to be got? What does gen. W. do, but order it to be drawn from the military chest. Now would gen. W. have done this, unless upon the ground that he knew he had ordered capt. Gaines to perform a military service? I mean no disrespect to Mr. Gaines: he must have found himself in a very disagreeable situation: but he was obliged to execute this *request*. However, it is to be observed, that all this was done with a sort of civil appearance. There must be a Marshal: Mr. Gaines is appointed, and without his knowledge or approbation. Turned into a bailiff, you must take this man, you are a Marshal, and you may do this dirty work yourself if you please, or, if not, you may employ serg. Dunbaugh, or any soldier; He must be forced to do it.

There was much perplexity observable in capt. Gaines's statement. In order to throw off his military garb in this affair, he is thrown into a dilemma, to make a fair statement of civil and military actions being performed in his own single person, and yet not to let them interfere. This perplexity was created by gen. Wilkinson; and was not in the narration of Mr. Gaines, but in the situation itself.

It is almost unnecessary, Sir, to waste the time of this Court in proving that gen. W. was the prime mover of all this nefarious business. The gentleman has thrown the responsibility on Judge Hall. It may be, that he is a very respectable man; but how free he could be to act, when he was solely under the movings of gen. W. I leave you to judge. But, however that may be, this respectable, honorable and upright Judge, really was mistaken as to the law. He really thought, it seems, that when a witness was summoned, he that moment became his prisoner; and, that he had a right to send him when, and how he pleased. The eulogiums given to Judge Hall and his conduct are, however, unhappily at variance,

But gen. Wilkinson asked Mr. Graham: who certainly delivered his testimony in a most correct manner and devoid of those perplexities which marked Mr. Gaines's. To me, it is most marvelous, that the Counsel on the other side cannot see that Mr. Graham's testimony does not go directly to fix the guilt of this transaction on gen. W. The communication between gen. W. and Judge Hall was made through Mr. Graham. What was its nature? "Go and ask Judge Hall, if he knows of any legal means to compel him to give testimony, and to compel him at all events; but, if you know of any legal means, use it." Is it not clear that all this was to shelter the main design, under forms of law? But with this man, (who is represented as the military despot of that country,) if he meant to do any thing—order it to be done, and it was executed. Can it be believed that he was not sensible, that what every man in the United States knew—(that his conduct excited horror wherever it was known,) ought to be an excitement to cover himself under the form of law? He did so in many instances, but his military garb was perceptible. Every minute act was, in fact, done by him; and those persons who were compelled to act for him, ought not to be so much the objects of the Court's censure, as the objects of its pity.

But this is not all. As was well observed by Mr. Botts, a man who does any thing towards carrying into effect any illegal act, subjects himself to all the measures of that act, and participates in its criminality. Mr. Gaines was asked whether gen. W. knew that Mr. Knox was there, (on board) as he wished measures to be taken for his relief. It appeared that every thing was known to him. Mr. Gaines told Mr. Knox that he could not let him go on shore for his clothes, and to get sea-stores, without the direction of gen. W. But they say, the ship was commanded by Mr. Reed. Sir, is it not clear that he was ready to obey the commands of the general? The vessel sailed directly as gen. W. came on board. Who was it that gave leave to passengers to go? Did not Mr. Graham tell you, that he was obliged to apply to gen. W. and not to capt. Reed? Sir, I understand that the whole of the naval force at New-Orleans was put under the immediate command of gen. W. It mattered not then, who was captain, but who was commander? They arrived at Hampton. There we are told, that they were not brought under the orders of gen. W. And why?—Because gen. W. advised—recommended—requested! I dare say that Bonaparte himself often *requests* his officers to do so and so; but who of them dare refuse to submit?

But it really was not so bad at last; for poor Knox had counsel. This Counsel suggests a doubt: it did no good to Knox. Why, Sir, I am old enough in experience to know, that when the Court shall give an order, the Counsel submit to it: and this was the case here.

Gentlemen then go on to conclude, that if no action would lie for this; if no trespass was committed, then no attachment would lie.

For the sake of argument, I will admit this, and what then? I say that if Knox's being conveyed like a felon from one part of the United States to another will not support an action of trespass, the Courts of Justice in the United States may as well be shut at once, and let us not be tantalized with phantoms: Let us not be tortured with apparent provisions, which know not how to support us. But it is said, that he was at liberty after he got on board. But, Sir, could he go ashore? What sort of liberty this is, every man must know.

I will not go into the law of the case, because I contend that it is unnecessary. We may safely rely upon the broad facts which are so apparent, When the process of this, or any other Court is so abused, as to defeat the ends of justice, the Court then ought to interfere. This is a position which is unanswerable. But if they do interfere, Mr. Hay recommends that they should do it in the same way which a learned Judge in Fredericksburg did sometime ago: summon a jury. Sir, I will not undervalue the privilege of trial by Jury on any account; but, instead of offering a boon to gen. W. you would pour contempt by the exercise he is attached. By the law, he is exonerated upon his own oath, if he answers interrogatories, and denies the facts charged, or, if he cannot deny them, but explaining the ground of his conduct to the satisfaction of the Court, he clears himself. But in case of a Jury, he must, instead of his own oath, have the united acquital of twelve men.

There was some difficulty mentioned, about these acts not having been done within the district: but a strong answer to that objection was made—that a part of it was done at Hampton, and within the district: for there, while on board, he certainly was the same prisoner, as he was when first conveyed on board. But, Sir, the process of an attachment is an auxiliary to a process of subpœna. They run parallel throughout the United States. I take it for granted, that whenever there is an improper use made of a process of subpœna, no matter where it is done, it is a process of this Court, and this Court has a right to take cognizance accordingly. I remember an authority for this doctrine, In the New-York case, Judge Patterson delivered it as his opinion, that a process of subpœna being served, the power of the Court in the attachment was commensurate.

In every point of view, Sir, I think that our motion for attachment is justifiable, and I pray the Court to award it.

Mr. HAY explained. He said, that if Mr. Wickham had attended to his observation, he would have heard him declare that the power of the Court was commensurate with the process of the Court: that if Knox had not come here, he would have been liable to the attachment of this Court for not coming: and, therefore, drew a kind of solicism, by asking, how could gen. Wilkinson be liable to attachment for making him come?

Mr. MARTIN. I rise to make a few observations, in which I shall satify the Court, that this was completely the act of gen. Wilkinson from the first to the last, and that it has been a military transaction throughout the whole, from the time capt. Gaines left fort Stoddard, until he arrived at this place; and that it had, in its whole tendency, a direct effect upon the course of civil justice.

Let us examine, Sir, what are the rights of men in a court of justice; which we must do, before we can know how far those rights have been violated. Each person there, whether he be charged with a crime, or whether he be not, has an equal right to procure the attendance of witnesses; and the laws give to each, an equally compulsory process. The United States in all cases, and the individual charged, as to the process of procuring witnesses, stand on the same ground. A witness is to be examined before a Magistrate, and then recognized to appear and give testimony at the time and place of trial. But if he refuses, he certainly is to be committed until the trial, and then be sent to the place where such trial is to take place. The process of summons and of attachment, are the same on both sides. But here is an advantage which the United States have over an individual. The diligence and attention of the law-officers are greater in behalf of the United States, though the law gives each the equal chance; but though the unfortunate prisoner, in a criminal case, might not possess that advantage, yet, whatever means are used, to illegally procure witnesses in behalf of the United States against the prisoner, is an interferance with the public administration of justice. And whether it is used to bring a witness here by unlawful means, or to keep a witness away by unlawful means, it is equally an imposition upon the rights of the citizen, and might obtain redress. The law, and the law only is to be resorted to, to procure evidence against the prisoner; and the law, and the law only, is to be resorted to for the prisoner to defend himself. He is to be tried in a legal manner, which could not be the case, if there was a difference in the rights. Whatever means, therefore, are used injurious against the prisoner, being unauthorised by law, admits of a remedy. Now, let us examine whether this testimony stands in that fair light which the law requires. I agree with the gentleman, that it is a singular case, and such an one as never was before; and if such a transaction was to be encouraged, it would take very little trouble to subject the course of justice to the destruction of any devoted victim.

Gen. Wilkinson however, must not be blamed, I suppose, because he found himself obliged to obey the orders of the Secretary at War. But this does not make it the less a military transaction. Here are a number of papers sent by the Secretary at War to gen. W. by capt. Gaines. Now his journey was entirely a military one, and not for civil purposes. This Mr. Gaines was the commander of a garrison; but he must leave his station, to go on this civil errand. Well: These blank summons's were carried to gen. W. to be filled up by him. Filled up by

a military man! And served, how? Why the gentlemen say by a civil officer. No, Sir, he had no civil authority. It is not pretended that he was instructed by the Attorney-General, and he was not a judge of the legal rules of such an appointment; and that his appointment was not marked with the legal prerequisites, is evident enough, It was the province of gen. W. to find out who could give testimony on this business, and to fill up the blanks. He was also to have the affidavits drawn: but this, for a colouring, was to be done before a civil Magistrate. When this witness and capt. Fort were taken before the Magistrate, they were called upon to answer printed interrogatories, (no doubt some which were suggested by Wilkinson.) This was on a Sunday. I always thought that Sunday was not a legal day for such purposes, yet it is a proper time to carry these men before a Magistrate. He then declined to answer such questions as the Magistrate propounded to him by the Magistrate. He was then put into the hands of the Sheriff, who was directed to have him there the next morning. The Sheriff received security for his appearance. What does Knox say about the next morning's interview? He says that he and capt. Fort were both of them asked a number of questions: some of them he says he answered, but, about others, he begged time to consult with a lawyer. Finding that he could not get any more answers, he wrote out a commitment, and sent them both to gaol, amongst the Negroes and Felons. And what for, Sir? It was for refusing to appear before him to answer interrogatories, and not for refusing to come to this Court to give testimony. At length, however, an order was written to the Marshal, to have this man transported here to give evidence. And is this, Sir, the manner in which testimony is to be taken? First interrogated by a military commander; then, from printed interrogatories, taken before a Magistrate by deposition—and all *ex-parte* Would a Court of Justice permit this? Can it be considered to be justice to make a man give his deposition upon certain *ex-parte* questions, taken down by such persons, whose interest and design it is to trammel and shackle it in such a way as that when the man comes to the trial to give evidence according to his knowledge of the fact, he knows not what to say: bound as he is by a paper which he has signed, the purport and consequences of which he does not know? I never heard Mr. Hay speak with more truth, than I heard him the other day on this very subject of depositions. He said it was not the words of the witness, but of the person who took down the deposition; and, that it could not be trusted to. It was most correct, it was most just: we felt the force of it. Is it not of importance, Sir, where the life, honour or the liberty of any man is at stake?

Well, Sir, gen. W. took all this pains to get evidence. But was it for the sake of the government that he has done this? I will admit, that, holding an important office under government, he might think to get favour, and obtain some future advantage by it. But

this was not all. Is it necessary, Sir, that I should tell you that gen. W. had a great and important stake, himself, in it? It is in vain that any gentleman should say that he had not. His own ways are to be justified, or he must be prostrated into the dust: and they can only be justified by the downfall of another. To prove the conviction of this gentleman, if it can be done, is his only hope of justification, so great is his stake. It was for this purpose that he pursued these witnesses, whose testimony it was his interest to obtain in so garbled a state, as that we should not be able to prove the whole truth on a cross-examination.

Having shewn that, between the government and himself, the pure stream of justice was thus sullied, we will examine into the further actions of Gen. Wilkinson in this business. He invites Mr. Knox to his house, through Sergeant Dunbaugh. Dunbaugh was surprised that the great puissant Gen. W. who had made men tremble in his presence, and before whom the rights of mankind were nothing, should invite a man of the appearance of Knox to his august presence. Knox goes. He invites him to a seat, and commences his conversation by a covert, asking what he knew of serg. Dunbaugh; and then proceeded to a great many questions about the expedition. Asked him if he had got paid yet? No, he had not. How much is due to you? 150 dollars. Well, I can let you have as much as that myself, I believe. Kind, affectionate man! But what was all this for? Why, to make interest with Knox, to get what he could out of him. He asks again and again about Mr. Burr. I do not say it was any attempt at the honesty of the man, to offer him 150 dollars; but to be sure, it is doing as gen. W. does in every thing.

Mr. M'Rae. I hope the gentleman would not say that it was to make him swear what was untrue.

Mr. Martin. Sir, I say that the direct tendency of it was to extract from him untruths, if he had been capable of uttering them. I do not say that Wilkinson told him to swear falsely; but Knox himself said that he considered it as a temptation upon him to give evidence, and this was the evident tendency of it.

The offer was made in that way, as understood by Mr. Knox, that if he would tell him what he could of the affair, he could place 150 dollars in his hands. Well, he began again talking with him, and wrote down what was said; but it was so imperfectly written, that Knox did not like it, and so he left him.

Well, the next thing we shall speak of, is the subpœnas. They were received by the gentleman, and filled with Mr. Knox's name, and I believe with Mr. Fort's name. Capt. Gaines, an officer under military authority, and with military rank, was to summon these persons, which he did: not as private citizens, but as to a military affair: that is clear enough. When Knox was summoned, did he attempt to refuse to come here? No, nothing of the kind; he was willing to set out immediately, only he mentioned the difficulty of his situation: That he was not provided to set out 1200

miles, as he expected in a short time to get some money, which he was then without. Is this criminal, Sir? To be sure he does not wear a sword, and therefore he must submit to such usuage as they pleased to inflict upon him. It was not then known that the military chest was to be drawn upon for this purpose. But, Sir, does gen. Wilkinson himself obey the orders of the government with that promptitude? He had been subpœnæd long before Mr. Knox, but he takes his own time. He can keep this Court and witnesses from day to day, but where is the attachment sent after him? None Sir: but we are told we must wait for this high and mighty man. And yet poor Knox, because he wanted to have his convenience attended to, must be treated like a felon, and taken out of jail, *nolens volens*, where he had been several days, until the prison-ship was ready, by which he was brought here. Well, but how he got into the hands of the Sheriff, we have no positive testimony; but is there any reasonable man who can doubt that it was by the direction of gen. W.—or that it was by his order that he was carried before Judge Hall on a Sunday? Well, Judge Hall found him in the hands of the Sheriff, and he leaves him there; and next day, because he refused to answer the interrogatories, he sends him to jail. And what is the reason of all these measures? The answer is "*necessity*." But who did these "necessary" acts? Gen. Wilkinson. But it is said that gen. W. not wishing Mr. Gaines to go wrong, directed him to go to some lawyer; and, I suppose, mentions whom. He had received occasional directions from the Attorney-General, who was the man to whom the Secretary at War had referred the subpœnas. This other lawyer was Mr. Duncan, gen. W's aid-de-camp: the man who marched before him into the Court of Justice, when he pompously bade defiance to the legal jurisdiction of his devoted country, and placed the laws at the feet of his military band, to the destruction of all civil authority.

Thus, however, we find the man is in jail, and he is taken out again to be transported to this place. We are told that the military garb is laid aside, and that this was an entire civil transaction; but really, if we look into the whole of it, we shall find that the military garb covers over the civil one. Gentlemen talk here about *doubt*. This really surprizes me, for I did not think that they doubted about any thing whatever, they appear so confident: but I am sure there is no ground for a doubt about this, it is all so plain. All we want says gen. W. is to carry this man to Richmond: how is this to be done? Why, it will be necessary to get a commission of deputy marshal for somebody: who is it to be? Gaines will do. He accepts the deputation for this very purpose. Now what is the nature of this deputation? First, no man can act as deputy without taking the same oath as the principal, according to act of Congress—Graydon 247. Again, he is obliged to give bond for the performance of his office. Now it does not appear, nay, we have proof that capt. Gaines neither took the oath, nor gave the requisite bond. How then could he be a deputy-marshal? But, Sir, this is not all;

If you observe, you will find that he does not take charge of the man himself. How does this poor fellow get out of jail? It was by a deputation from Deputy Gaines. It was no military order, though it was given from a Captain to a Sergeant, but it was done in a civil capacity. How do we know what it was? The gentlemen say it was not a military order, because he has not signed himself "*Captain.*" We can with equal propriety say that it was no civil order, because he has not signed himself "*deputy-marshal.*" Gentlemen, however, call it only a request to serg. Dunbaugh to do it.

Mr. M. here read the precept, which begins thus:—"Sergeant Dunbaugh—you are hereby authorised and commanded to receive," &c. Here then is a military order, if ever there was one, notwithstanding it is not signed "captain" at the bottom. Where is the request that is talked about? No, it is authorising and commanding him in a true military style, to go and take that man out of jail.

It was said that there could be no collusion in this business, between gen. W and Judge Hall, because they were at variance! But what proves the collusion more palpably that this very amalgamation of office? It is the strongest reason in the world to prove that Hall would do what Wilkinson wished him to do, in order to once more obtain his favour. Could he but fear that man who had but a short time before come into a Court of Justice, and looking round the Court, with audible importance, denounced two very respectable gentlemen of the bar as traitors to their country? How could he but dread the temerity of offending, or disobeying the mandates of such a man?

But let us examine into the nature of this civil and military character when united together. As a deputy-marshal, gen. W. could have no command over him. Knox himself was as free from his military authority, as he in his civil, was of his general. This we might be led naturally to suppose, if we are to consider Mr. G. only in his civil capacity. But mark what Mr. Gaines says. This deputy-marshal has told you (he was so completely under the direction of Wilkinson), that if gen. W. had ordered him to have put Mr. Knox in irons, he should have done it. As entirely, therefore, was the civil character subject to military here, as any military character can be to his chieftain. This man was brought away with no shirt but one that he had borrowed! Is this the right of evidence? Is not this the very ground-work of the destruction of public trial, in the fair, honest view we are led to take of it?

It was said that the Court could not take cognizance of the offence, because it was done at New-Orleans. I much doubt this construction. I think that if gen W. had never come here, the process of this Court could bring him, wherever he might be caught within the United States: and that he could be punished any where, for a crime which operated upon a case to be tried in this Court, as a federal Court. This is the nature of the laws affecting contempt. Why, Sir, is it improper to insult a Judge on the Bench? Be-

cause it tends to intimidate, and to make impressions unfavorable to the cause of justice. Why are Judges not permitted to be abused or intimidated by newspaper publications, as has been done within the purview of this Court? For the same purpose—that he should be free and unbiassed in giving judgement: not fearing any man or party, lest it should have a tendency to obstruct the pure channel of justice. But we are not left to this reason alone. The process of this Court had cognizance, while the act itself was incomplete. The process was completed on the arrival of the witness within the district, but the violence and force continued until a few hours before he reached Richmond: for even he was not permitted to go on shore, a few miles off, in order to be up here sooner than the vessel, to furnish himself with a few necessary articles to come decently into a Court of Justice with. We find serg. Dunbaugh goes ashore with him, and walks up with him. No reason is assigned for this, only that he came up with Mr Knox to accompany him, and see that he did not miss his way!

The conduct of gen. W. in the very first movement of this business, is very artful, and has been rendered equivocal. Why, Mr. Knox, are you not afraid to appear before me? Why should he be afraid of gen. W.? If he had been with Mr. Burr during all his journey, he had no occasion to be afraid of him for that. No: it was a civil Magistrate that he had occasion to be afraid of, through this great man.

But a gentleman has found out, that it is not so dangerous a thing for the civil and military character to be blended in one person; because he says the Constitution has provided it to be so in the offices of the President of the United States, who is a military commander as well as the Chief Magistrate. He is the first civil Magistrate. But how is he Magistrate? he cannot arrest any person, nor can he do a civil act. He must apply to others to get an act of any civil capacity done. He can do nothing, but by the aid of his military authority.

We have been told of the great patience and indulgence with which the Court have heard our arguments. It is all right: and the Court ought to do it, lest they should be censured.

Mr. M'Rae. I did not attribute any measure which the Court has taken, to be from a fear that if it not acted so, it might be censured.

Mr. Martin. Sir, the gentleman said that great indulgence had been granted to col. Burr, for which he complimented the Court. But, however, the gentleman will certainly remember another circumstance, saying, that we wanted to imprison the witness, whilst Aaron Burr was stalking about in freedom. I cannot help congratulating the gentleman that now he may walk at large, without his eyes being hurt with the disagreeable sight of seeing Aaron Burr at liberty. Whatever lenity he might have had, or whatever liberty he enjoyed, he is alone entitled to the Court for,

[This closed the argument on the motion to attach gen. Wilkinson. The opinion of the Chief Justice will be found under the head of Saturday, June 27.]

[Here follows part of Wednesday's and Thursday's procedings, omitted under their proper heads, in order to preserve connection in the important argument just closed.]

WEDNESDAY, June 24.

The Grand Jury entered, and Mr. *J. Randolph*, (their foreman), addressed the Court:

"May it please the Court: We have agreed upon several indictments," which he handed in at the Clerk's table.

The Clerk read the indorsements upon them as follows:

An indictment against AARON BURR for Treason.
"*A True Bill.*"

An indictment against AARON BURR for a Misdemeanor.
"*A True Bill.*"

An indictment against HERMAN BLANNERHASSET for Treason.
"*A True Bill.*"

An indictment against HERMAN BLANNERHASSET for a Misdemeanor.
"*A True Bill.*"

Mr. *J. Randolph*, (their foreman), then continued: May it please the Court: Although the Grand Jury have returned the bills, they have still other subjects for their consideration, and have adjourned themselves to meet to-morrow at 10 o'clock.

A short time elapsed, when Mr. *Burr* addressed the Court: As bills had been found against him, it was probable the public prosecutor would move for his commitment: he would, however suggest two ideas for the consideration of the Court. The one was, that it was within their discretion to bail in certain cases even when the punishment was death: and the other was, that it was expedient for the Court to exercise their discretion in this instance, as he should prove that the indictment against him had been obtained by purjury.

Mr. HAY moved for the commitment of Aaron Burr: he stated that if the Court had the power to bail, by the third section of the judicial act, it was only to be exercised according to their sound discretion; and that the prisoner was not to demand bail, because the Court was authorised to grant it—but from his making out an adequate case. He quoted 4 Black. p. 298, to prove that this discretion ought to be deliberately exercised.

Mr. MARTIN. The Counsel for the prosecution have then admitted the right of the Court to give bail according to its discretion.

Mr. M'RAE did not understand from the judicial act, that the discretion was to be exercised at this stage of the business, but only at the time of making the arrest.

Mr. MARTIN. I can hardly suppose that this Court has less power than the Court of King's Bench in England, which certainly possesses this authority according to 2 Hale, p. 139.

Mr. WIRT was extremely solicitous to do any thing compatible with his duties, which might soften the situation of the prisoner. He did not perceive the analogy which had been drawn between this Court and the Court of King's Bench. The powers of that Court grew out of the common law of England; whereas, the powers of this Court were defined by a statute of our own country. What says the 33d sec. of the Judicial Act? "Upon all *arrests* in criminal cases, bail shall be admitted, except where the punishment may be death: in which case it shall not be admitted but by the Supreme or a Circuit Court, or by a Justice of the Supreme Court, or a Judge of a District Court: who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence and the usages of law." Is not this enquiry by the Court stopped? Is not the evidence and testimony stopped, when it is now locked up by the finding of the Grand Jury? Would it be right for this Court to go into all the merits of the case, which this clause evidently requires, before the Court can exercise this discretion? Will the Court go into the investigation of the evidence, and thus throw itself into collision with the Grand Jury? It is obvious from those considerations, as well as from the other words of the law, that such a discretion does not exist at this stage of the business, but only at the time of arrest.

Mr. WICKHAM. If the Court of King's Bench possesses this authority, shall it be contended that this Court is without it? shall it be said that the liberties of the people of this country are not so well secured, as those of Great Britain? that a British subject has greater privileges than an American citizen? It is said, however, that this Court grows not out of the common law, but out of our statutes: but will it be said that when this Court has once been constituted, it does not proceed according to the established jurisprudence—that is, the common law? There can be no question that a State District Court can bail, even in capital cases. "Will this Court, however, place itself in opposition to the Grand Jury?" No, Sir, it will not: and Mr. Wirt certainly forgets that this Court is to hear both sides of the evidence; whereas the Grand Jury heard one side only; and indeed a part only of that side: for had the United States' Attorney sent up all the witnesses, whose names appear at the foot of the indictment, very different would have been the result of their enquiries. The ground which we take is this; that the Grand Jury have found their bill upon the testimony of a perjured witness; and if the Court were to bail col. Burr, would it not be justly inferred that they had set themselves up in opposition to the Grand Jury, but that they had been furnished with lights which had had been denied to that Jury.

CHIEF JUSTICE. Mr. Martin, have you any precedent, where a Court has bailed for treason, after the finding of a Grand Jury on

this ground, that the testimony laid before the Grand Jury had been impeached for perjury, or that other testimony had been laid before the Court, which had not been in the possession of the Jury?

Mr. MARTIN had not anticipated this case; and had not, therefore, prepared his authorities: but he had no doubt that such existed.

Mr. BURR. Two distinct questions have been blended in this discussion, which ought to have been kept separate: 1st. Whether this Court had the right to bail according to its discretion; and 2d—Whether it was expedient to exercise its right in the present instance. If the Court had no discretion, it was unnecessary to produce evidence. The question, ought, therefore, to be previously settled.

Mr. HAY, when he first addressed the Court, was of opinion, that the Circuit Court had this power: having been misled by a very transient conversation with the Chief Justice on the first examination of Mr. Burr. He had, however, considered this subject more maturely; and the more he thought of it, the more was he convinced that Aaron Burr was not privileged to demand bail. This question was to be decided by the common law, by the act of Congress, or by the acts of Virginia.

It could not derive the authority from the common law, because this Court is of a recent origin; deriving its power not only from a late law, but a late government; and it has no authority but from an established law. Does then the law which established it, expressly convey this power? [Here Mr. H. read the law.] Now, how are the Court to attend to the nature and circumstances of the case? Will they require all the evidence before them, which has just occupied the attention of the Grand Jury for 7 or 8 days? Mr. Wirt's argument on this point was conclusive. The law too was applicable to a prisoner only at the time of his *arrest*, and not of his indictment. In the last case, the situation of the accused becomes still more precarious. The danger which he apprehends, comes nearer and nearer, and the temptation to violate his recognizance, becomes much greater than at the earlier steps of the prosecution.

No man will contend that the common law is in force in the Courts of the U. States. As soon might you assert the validity of the laws of the Cape of Good Hope or of Turkey. It was therefore ridiculous to compare the organization of the Court of King's Bench with that of the present Court. As to the complaint of Mr. Wickham, that by this doctrine an American citizen would stand on worse ground than a British subject, it was unavailing. Perhaps Courts of justice would even be more disposed to bail for Treason under such a government as that of G. Britain than in our own, where the power of the government falls so rarely and so lightly upon the people. Were even the common law in force in the U. States, it would have no relation to the *organization* of our Courts.

The power of bailing is not then derived from the common law, nor the act of Congress; nor is it decucible from the laws of Virginia. In cases affecting life, the prisoner is not entitled to bail by our laws.

Mr. WIRT. I have stated, that the powers of the Court of King's Bench are not applicable to this case, because that Court is the creature of the common law, whose powers have been growing up from time to time; whereas, this Court is fixed and defined by law. There is another great difference. The powers of the Clerk of the King's Bench take their origin in a fiction. It is supposed to be held *coram ipso rege!* In its origin, the king himself sat there, and he is still supposed to sit. Treason was a crime against his dignity: he might bail for it; and the same power belongs to the Judges who represent his person. But how is it with us? Treason is an offence against the people of this country. And have the people ever sat here for the administration of justice? and are the Judges of this Court invested with the powers of the people? But on the supposition that this situation *does* exist, is not the power of bailing removed by a positive law? Does not the act of Congress expressly take it from the Court?

Mr. WICKHAM. Two indictments have been found for treason: one against col. Burr, and the other against Blannerhasset. If the latter was *now* to come into Court, he would be bailed, according to Mr. Wirt's distinction, because not previously arrested; whereas Col. Burr would be divested of the very same privilege, though he was indicted for the very same crime.

Mr. E. RANDOLPH expatiated on this subject at considerable length, and with great ingenuity.

Mr. MARTIN protested against the ingenious *fiction* of Mr. Wirt. He challenged him to name any king from the days of K. Arthur to the present time, who did, or could set in the Court of King's Bench.

After a long and elaborate argument on this point, the CHIEF JUSTICE decided that the Court had the power to bail a prisoner indicted for treason, according to its sound discretion; and that this discretion was to be exercised according to the nature and circumstances of the evidence, and the usages of law.

Mr. BURR stated, that the Court had then decided that they possessed the discretionary right to bail: it would next be necessary to shew, that they ought to exercise their discretion in this instance; that the indictment had been founded on the testimony of a perjured witness; that Gen. Tupper would prove there had been no such resistance to his authority as had been stated by that witness; and that although Gen. Tupper had mentioned this circumstance to the prosecutor, he had not been sent up to the Grand Jury.

Mr. M'RAE. Gen. Tupper has made no such communication to me.

Mr. HAY. Though I have had a conversation with Gen. Tupper I do not exactly recollect what it was. The truth is, I have carefully avoided conversing with the witnesses of the U. States. Gen. Tupper has made an application to me for permission to go away; but I said that not for worlds would I submit to the imputation of consenting to the departure of any of the witnesses. Gen.

Tupper was not sent up to the Grand Jury, because he was not considered as a very material witness.

Mr. WIRT. He has made no such communication to me; but I take upon me to assert, that the resistance to gen. Tupper was not the treason on which this indictment has been founded.

Mr. WICKHAM. Suppose a man was indicted for a murder committed at some distance from this city, and every man in the city said that he was at that moment walking in the streets—would such an indictment preclude a Court from bailing him? This *constructive* murder is of the very same stamp as the constructive treason of col. Burr: who was indicted for an act said to be committed on Blannerhasset's Island, where he was said to be present, although he was at a considerable distance from the place.

Mr. WIRT. Why produce evidence to provc the perjury of a witness? Why look to the indictment itself for a proof of its own fallacy, when the requisitions of the Court have not yet been satisfied? The Court wanted authorities to prove, that it was in *such* a case as this that it had a discretionary right to demand bail according to the *usages of law*.

The CHIEF JUSTICE had never known of a case similar to the present.

Mr. MARTIN would produce authorities, if he had time allowed to him.

Mr. E. RANDOLPH drew an analogy between this and the case of a coroner's inquest.

Mr. WIRT said there was no apposite analogy between them.

The CHIEF JUSTICE insisted upon the necessity of producing adjudged cases.

Mr. BURR did not wish to protract the session of the Court, to suit his own personal convenience. There was no time at present to look out for authorities.

The CHIEF JUSTICE observed, that he was then under the necessity of committing col. Burr.

Mr. BURR stated, that he was willing to be committed, but hoped that the Court had not forestalled its opinion.

CHIEF JUSTICE. I have only stated my present impressions.—This subject is open for argument hereafter.—Mr. Burr stands committed to the custody of the Marshal.

He was accordingly conducted to the jail of Richmond.]

THURSDAY, June 25.

About one o'clock the Grand Jury entered, and their foreman, (Mr. *J. Randolph*), addressed the Court to the following effect.

"May it please the Court. The Grand Jury have been informed, that there is in the possession of Aaron Burr, a certain letter with the post-mark of May the 13th, from James Wilkinson, in cyphers, which they deem to be material to certain enquiries now pending before them. The Grand Jury are perfectly aware, that

they have no right to demand any evidence from the prisoner under prosecution, which may go to criminate himself. But the Grand Jury have thought proper to appear in Court, to ask its assistance, if it thinks proper to grant it, in making such a requisition in their behalf."

Mr. BURR rose, and asked whether the Court was about to give an opinion?

The CHIEF JUSTICE stated, that the Court was about to say, that the Grand Jury were perfectly right in the opinion, that no man can be forced to furnish evidence against himself. He presumed that the Grand Jury wished also to know, whether the person under prosecution could be examined on other questions, not criminating himself.

Mr. BURR declared, that it would be impossible for him, under certain circumstances, to expose any letter which had been communicated to him confidentially. How far the extremity of circumstances would impel him to such a conduct, he was not prepared to decide; but it was impossible for him even to deliberate on the proposition to deliver up any thing which had been confided to his honour, unless it was extorted from him by the law.

Mr. *J. Randolph*, (foreman.) We shall withdraw to our chamber; and when the Court have decided upon the question, they will announce it to the Grand Jury.

The CHIEF JUSTICE knew not that there was any objection to the Grand Jury's summoning any man as a witness who lays under an indictment.

Mr. MARTIN said there could be no objection.

Mr. *J. Randolph* said, he was afraid that the object of this Grand Jury had been misunderstood by the Court. The Grand Jury had not appeared before them to apply for the person of Aaron Burr, but for a certain paper, which may, or may not be in his possession: and upon its being, or not being in his possession — and upon its being possible, or not possible to indentify that paper, it might depend whether Aaron Burr himself was, or was not a material evidence before them. And then the Grand Jury withdrew.

Mr. M'RAE rose, and addressed the Court.

He was solicitous, he said, to lay a communication before them, on a circumstance which had lately transpired. The Grand Jury had asked for a certain letter in cyphers, which was supposed to have been addressed by gen. Wilkinson to the accused. The Court had understood the ground on which the accused had refused to put it in their possession: which ground was an apprehension lest his honour should be wounded, by his thus betraying matters of confidence. I have seen gen. W. Sir, since this declaration was offered: I have informed him of the communication which has thus been made; and the general has expressed his wishes to me, and requested me to express those wishes, that the whole of the correspondence between Aaron Burr and himself might be exhi-

bited. The accused has now, therefore, a fair opportunity of producing this letter. He is absolved of all imputation: his honour is perfectly safe.

Mr. BURR. The Court will probably expect from me some reply. The communication which I made to the Court, has led, it seems, to the present invitation. I have only to say, Sir, that this letter will not be produced. The letter is not at this time in my possesssion, and gen. Wilkinson knows it.

Mr. M'RAE hoped that notice of his communication would be sent to the Grand Jury.

Mr. MARTIN hoped that col. B's communication also would go along with it.

The CHIEF JUSTICE was unwilling to make the Court the medium of such communications.

Mr. M'RAE hoped that the Court *would* notify his communication to the Grand Jury, and for an obvious reason. When the Grand Jury came into Court to ask for the paper, what did the accused say? Did he declare that it was not in his possession? No: he merely said that honour forbade him to disclose it. The inference undoubtedly was, that he had the paper, but could not persuade himself to disclose it. And what then must have been the impression on the mind of the Grand Jury? A cloud of suspicions must have fastened themselves upon their mind—suspicions unjustly injurious to the character of gen. W.—and which the present communication may at once disperse. It is but justice, therefore, to gen. W. to whom the enquiries of the Grand Jury may at present relate, to give them the benefit of this information.

Mr. BURR. Gen. W. Sir, is extremely welcome to all the eclat which he may expect to derive from this challenge; but, as it is a challenge from him, it is a sufficient reason why I should not accept it. But as the remarks of the last gentleman seem to convey some reproach against me, (which no man who knows me, can believe me to deserve), it may be proper to say, that I did voluntarily, and in the presence of a witness, put the letter out of my possession for a certain purpose. I wished, Sir, to disable any other person, as well as myself, from laying such a paper before the Grand Jury. Gen. Wilkinson knows this fact.

The CHIEF JUSTICE then reduced these communications to writing: which message being read to the Court, and afterwards corrected, was transmitted to the Grand Jury.

Mr. BURR. Let it be understood, that I did not put this paper out of my possession, because I expected the Grand Jury would take up this subject, but from a supposition that they might do so.

Mr. WICKHAM was interrupted by the entrance of the Grand Jury: when Mr. *J. Randolph*, (their foreman), informed the Court, that they had agreed upon some presentments—which he then delivered into the hands of the Clerk. The Clerk read as follows:—

"The Grand Inquest of the United States for the District of Virginia, upon its oath presents—That

Jonathan Dayton, late a Senator in the Congress of the United States from the State of New-Jersey;

John Smith, a Senator in the Congress of the United States from the State of Ohio;

Comfort Tyler, late of the State of New-York;

Israel Smith, late of the State of New-York; and

David Floyd, late of the Territory of Indiana,

are guilty of Treason against the United States, in levying war against the same: to wit: at Blannerhasset's Island, in the county of Wood, and state of Virginia, on the 10th day of December, 1806—

Upon the information of

William Eaton,	Alexander Henderson,
Erick Bollman,	James Wilkinson,
Peter Taylor,	Hugh Phelps,
Jacob Allbright,	Jacob Dunbaugh,
Charles Willie,	John Monholland,
John Graham,	Chandler Lindsley,
Samuel Swartwout,	James Knox,
George Morgan,	William Love,
John Morgan,	Thomas Hartly,
Thomas Morgan,	Stephen Welch,
Elias Glover,	James Kinney,
D. Woodbridge, Jr.	Samuel Moxley,
David C. Wallace,	David Fisk, and
Edmund B. Dana,	Benjamin H. Latrobe.
John G. Henderson,	

JOHN RANDOLPH."

"The Grand Jury," (continued Mr. R.) "have no further presentments to make." He then delivered two papers which they had received from the Court. The one was a cyphered letter, addressed to H. Wimbourn: the other was the letter to colonel Morgan.

The CHIEF JUSTICE. Mr. Attorney, have you any thing more for the Grand Jury?

Mr. HAY. I can have all the indictments ready to be laid before them to-morrow.

Mr. *Taylor*, (from Norfolk.) Is it not customary for the Attorney to file information upon these presentments? Is there any necessity for detaining the Jury? [Some objections were made.]

Mr. *J. Randolph.* May not the bills be laid before another Grand Jury, as the parties presented are not now in custody?

Mr. HAY. That course will be productive of great inconvenience. All the witnesses are now here; and they will not, perhaps, appear before another Grand Jury: and the present Grand Jury is already in possession of all the evidence.

Mr. *J. Randolph* hoped that they would be discharged. He was not anxious on his own account; but there was one of the Jury peculiarly and delicately situated, who wished to return to his family.

Mr. *Taylor* observed to the Court, that a circumstance of a very affecting nature, made him peculiarly anxious to return home.

Mr. HAY was extremely sorry that he could not gratify the wishes of the Jury, but the interests of the United States forbade him. He would have the indictments ready, at any hour in the morning that the Jury would name.

Nine o'clock was mentioned, and the Jury were then adjourned to that hour.

FRIDAY, June 27.

The Court met at 9 o'clock. About 10, the Grand Jury entered, and Mr. *J. Randolph*, (their foreman), presented to the Clerk ten different indictments: five of them for Treason, against *Jonathan Dayton*, *John Smith*, *Comfort Tyler*, *Israel Smith*, and *David Floyd*: and five for a Misdemeanor against the same individuals respectively.

The CHIEF JUSTICE then addressed the Jury: and in fervid and elegant terms, complimented them upon the patience and attention with which they had performed their duties; and concluded, by discharging them from all further attendance.

The Court then adjourned till 12 o'clock.

When it had assembled, Mr. BOTTS requested the Court to remove Mr. Burr from the public jail, to some comfortable and convenient place of confinement. The grounds of this motion are to be found in the following affidavit, made by some of Mr. Burr's Counsel, and laid before the Court.

WE, who are Counsel in the defence of col. Aaron Burr, at the suit of the United States, beg leave to represent to the Court, that in pursuance of our duty to him, we have visited him in his confinement in the city jail: that we could not avoid remarking the danger which will most probably result to his health, from the situation, inconveniencies and circumstances attending the place of his confinement: but we cannot forbear to declare our conviction, that we ourselves cannot freely and fully perform what we have undertaken for his defence, if he remains in the jail aforesaid, deprived as he is of a room to himself—it being scarcely possible for us to consult with him upon the various necessary occasions which must occur: From all which we believe, that he will be deprived of that assistance from Counsel which is given to him by the Constitution of the United States, unless he be removed.

EDMUND RANDOLPH,
JOHN WICKHAM,
BENJAMIN BOTTS.

Sworn to in open Court, by Edmund Randolph, John Wickham, and Benjamin Botts, Esqr's. June 26, 1807.

WM. MARSHALL, *Clk.*

The Counsel for the prosecution were perfectly silent on the motion.

After a long and desultory argument by Mr. Burr's Counsel, the Court determined that the prisoner should be removed to his former lodgings near the Capitol, provided they could be made sufficiently strong for his safe-keeping.

Mr. *Latrobe*, Surveyor of the public buildings of the United States, was requested to inspect them; and, upon his Report, the Court passed the following order.

"Whereupon, it is *ordered*—That the Marshal of this District do cause the front room of the house now occupied by Luther Martin, Esq.—which room has been, and is used as a dining-room, to be prepared for the reception and safe-keeping of col. Aaron Burr, by securing the shutters to the windows of the said room by bars, and the door by a strong bar or padlock: And that he employ a guard of seven men, to be placed on the floor of the adjoining unfinished house, and on the same story with the before-described front room, and also at the door opening into the said room: And upon the Marshal's reporting to the Court, that the said room has been fitted up, and the guard employed—that then the said Marshal be directed, and he is hereby directed to remove to the said room, the body of the said Aaron Burr from the public jail: there to be by him safely kept."

Mr. HAY. My only wish is, that this prosecution should be regularly conducted. Is it not the usual practice to read the indictment first, and then move for the *venire*?

Mr. BURR. I will say, that I have been furnished with a copy of the indictment—that I have perused it—and that I plead *not guilty* to it.

Mr. WIRT. The usual form requires the actual arraignment of the prisoner. However, the Court may dispense with it if they think proper.

Mr. HAY was indifferent about the form, if the law could be substantially executed. He supposed that a simple acknowledgement of the prisoner was sufficient, without the customary form of holding up his hand, &c.

CHIEF JUSTICE. It is enough, if he appear to the indictment, and plead *not guilty*.

The Clerk then read the indictment against Aaron Burr for Treason against the United States—which specifies the *place* of the overt act to be at Blannerhasset's Island, and the *time* on the 10th day of December, 1806.

When he had concluded, Mr. BURR addressed the Court:

"I acknowledge myself to be the person named in the indictment. I plead NOT GUILTY, and put myself upon my country for trial."

Mr. HAY then addressed the Court on the *venire* that was to try the issue between the prisoner and the United States. There was

an apparent incompatibility on this point, between the 29th section of the act of Congress, and the 8th amendment to the Constitution. It was not certain that this act was in force. It was passed on the 24th day of September, 1789; and it provides, that "in cases punishable with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve jurors at least shall be summoned from thence." Subsequent to this, a Constitutional provision was made, requiring that the trial should be held before "an impartial Jury of the State and District wherein the crime shall have been committed." If then this law is in force, there must be 12 Petit Jurymen summoned from Wood county, which would make it impossible to have the trial at an early day. Here then was the difficulty. The act was passed in 1789: the amendments to the Constitution were not ratified before the 15th December, 1791. Does then the Constitution repeal this law? Had the 8th amendment formed an original part of the Constitution, no more would have been requisite, than an impartial Jury from the State and District where the crime was committed. Had Congress then proceeded to pass this law with the Constitution thus before them, would it not be considered as a violation? Had it then any force at *this* time?

Mr. M'RAE quoted the 2d vol. of the act of Congress, p. 226, sec. 3, to shew that the first law was considered to be in force, notwithstanding this amendment to the Constitution.

The CHIEF JUSTICE had no difficulty on the subject. He saw no incompatibility between the law and the Constitution. He had no doubt that the law was still in force.

Mr. BURR had not considered the subject maturely; but, at present, saw no inconsistency between them. However, as this law was most probably intended for the benefit of the accused, he consented to wave the right.

Mr. WIRT. But there is another consideration, Sir. Can consent take away the error? In Scotland, in the celebrated case of Kinlaw, he consented to draw one of the Jurymen, and afterwards pleaded the error in bar of judgment. After a long and elaborate argument, the Court rejected his plea, though there was a division among them.

Mr. MARTIN. In that case, (or what is the same, Weddiburn's case), there was but one dissentient Judge.

Mr. HAY. In the cases of Hardy and Tooke, a question was made, whether the Jury must be kept together during that long trial. Though the prisoner at the bar consented to the proposition, the Court nevertheless instructed the Sheriff to keep them together.

Mr. BOTTS protested against the delay and inconvenience which would ensue from summoning the *venire* from Wood county. He animadverted upon the cases of Kinlaw, Hardy, and Fries; and suggested several ideas respecting the doctrine of challenge.

The CHIEF JUSTICE believed that the provision was not abso-

lutely obligatory, if both parties would wave the right: but it was as much so, if the United States insisted upon the right, as if the prisoner himself had done so. If the United States insisted upon its execution, the law must be executed, unless there was sufficient evidence to satisfy the Court that such a measure would violate the amendment to the Constitution, which requires a trial to be held by an impartial Jury. Unless both sides therefore consented, it was his opinion that the Court was bound by this law.

Mr. HAY felt no disposition to delay the trial; but he could not think of pledging himself to a such a measure, without due deliberation. He would consult with the gentlemen associated with him, on this point, and inform the Court of the result.

The Counsel for the prosecution then retired from the bar; and, after a few minutes' conversation, Mr. HAY informed the Court, that they could not assume the responsibility of consenting to such a proposition. The law seemed to be imperative in its language—"twelve Petit Jurors, at least, *shall* be summoned." He must, therefore, request the Court to direct a *venire* of 12 men, at least, to be summoned from Wood county.

The CHIEF JUSTICE enquired what *number* should be summoned?

Different numbers were named, and there appeared to have been a great difference in the practice. The common law requires 48; and cases were cited where not less than 60 and 72 Jurors had been summoned.

The Court finally decided, that the entry should be made for a *venire* of 48 Jurors; 12 of whom, at least, were to be summoned from Wood county.

A long and desultory conversation ensued upon the *time* when the process was to be made returnable; or, in other words, when the trial in chief was to commence. Some contended, that 20 days would be sufficient to serve the *venire* in Wood county: others, that 35 would be necessary. The general opinion seemed to be in favor of the first Monday in August.

The CHIEF JUSTICE would have preferred the shortest possible day, in consideration of the expence and inconvenience which would result from the delay; unless, indeed, more important circumstances should have recommended a longer period—such as the necessity and advantage of obtaining witnesses from distant parts of the country.

The Court, however, assigned no particular period, and the decision was deferred.

Mr. HAY informed the Court, that the Clerk was doubtful whether the parties last indicted, should be brought before the Court by a capias or a summons. He should now move for a capias.

The CHIEF JUSTICE replied there could be no difficulty on the subject.

SATURDAY, June 27.

The CHIEF JUSTICE delivered the following OPINION on the motion for an attachment against Gen. Wilkinson.

THE motion now under consideration was heard at this time, because it was alleged to be founded on a fact which might effect the justice of the case in which the Court is about to be engaged; and because, while the bills were depending before the Grand Jury, the Court might, without impeding the progress of the business, examine into the complaint which has been made.

The motion is to attach gen. Wilkinson for a contempt of this Court, by obstructing the fair course of justice with regard to a prosecution depending before it. In support of this charge, has been offered the testimony of Mr. Knox; who states a conversation between gen. Wilkinson and himself, previous to his being served with a subpœna; the object of which was, to extract from him, whatever information he might possess respecting the expedition which was the subject of enquiry in this Court; and who states also, that he was afterwards summoned before Judge Hall, who examined him upon interrogatories, and committed him to jail: whence he was taken by order of the Deputy-Marshal, who was a military, as well as civil officer, and put on board the Revenge, in which gen. Wilkinson sailed, for the purpose of being brought from New-Orleans to Richmond.

That unfair practices towards a witness who was to give testimony in this Court, or oppression under colour of its process, although those practices and that oppression were acted in another district, would be punishable in the mode now suggested, provided the person who had acted therein came within the jurisdiction of the Court, is a position which the Court is not disposed to controvert: but is also believed, that this mode of punishment ought not to be adopted, unless the deviation from law could be clearly attached to the person against whom the motion was made; and unless the deviation was intentional, or unless the course of judicial proceeding was or might be so affected by it, as to make a punishment in this mode obviously conducive to a fair and correct administration of justice.

The conversation which took place between gen. Wilkinson and the witness, on the arrival of the latter at New-Orleans, was manifestly held with the intention of drawing from him, any information which he might possess, relative to the expedition which was then the subject of enquiry. In this intention, there was nothing unlawful. Government, and those who represent it, may justifiably and laudably use means to obtain voluntary communications—provided those means be not such, as might tempt the person making them, to give an improper colouring to his representations: which might afterwards adhere to them, when repeated in Court. The address stated to have been employed—the condescension and regard with which the witness was treated, are not said by himself

to have been accompanied with any indications of a desire to draw from him more than the truth. The offer of money, if with a view to corrupt, could not be too severely reprehended. It is certainly a dangerous species of communination between those who are searching for testimony, and the person from whom it is expected. But in this case, the Court cannot contemplate the offer as being made with immoral views. The witness had a right to demand from those he was expected to accuse, a small sum of money, sufficient to subsist him on his return to his home. He was asked, whether on receiving this sum, his objections to giving testimony would be removed? This was certainly a delicate question, but it might be asked without improper mntives: and it was pressed no further. This is not shewn to be an attempt to contaminate the source of justice, and a consequent contempt of the Court, in which it is to be administered.

The imprisonment of Mr. Knox, and the order for conveying him from New-Orleans to Richmond, were the acts of Judge Hall. Whether his proceedings were legal or illegal, they are not shewn to have been influenced by gen. Wilkinson, and this Court cannot presume such to have been the fact. Gen. Wilkinson therefore is not responsible for them. They were founded entirely on an affidavit made by him; but there was no impropriety in making this affidavit, and it remained with the Judge to decide what the law would authorise in the case.

All the subsequent proceedings were directed by the civil authority. The agents, who executed the orders of the Judge, were indeed military men, who most probably would not have disobeyed the commander in chief; but that officer is not responsible in this way, for having failed to interpose his authority, in order to prevent the execution of the orders of the Judge, even if those orders ought not to have been given.

Upon a full view of the subject, the case appears to be this: Gen. W. was desirous that the testimony of the witness should be obtained; and aware of the accusation which had before been brought against him, for the use he had made of the military power, he was desirous of obtaining the testimony by lawful means; and therefore referred the subject to the Judge of the Territory, under whose orders all subsequent proceedings were taken. Whether the Judge did or did not transcend the limits prescribed by the law, those under officers who obeyed his orders, cannot be supposed to have acted with a knowledge that he had mistaken his power. Should it be admitted that this would be no defence for them in an action to obtain compensation for the injury, it furnishes sufficient evidence, that no contempt was intended to this Court by gen. Wilkinson; that he has not been guilty of any intentional abuse of its process, or of any oppression in the manner of executing it.

It is said that capt. Gaines, the gentleman whom the Marshal appointed as his deputy for this particular purpose, had not taken the oath of office, and was therefore not qualified to act in that

character. However correct this observation may be in itself, it does not appear to the Court to justify an attachment against gen. Wilkinson. The person who sees in the possession of another, a commission as Deputy-Marshal, and sees that others are acting under that commission, ought not to be subjected to a process of contempt, for having made no enquiries respecting the oath which the law requires to be taken.

The attachment will not be awarded, because gen. Wilkinson cannot be considered as having controuled or influenced the conduct of the civil magistrate; and because, in this transaction, his intention appears to have been not to violate the laws. In such a case, where an attachment does not seem to be absolutely required hy the justice due to the particular individual against whom the prosecution is depending, the Court is more inclined to leave the parties to the ordinary course of law, than to employ the extraordinary powers, which are given for the purpose of preserving the administration of justice in that purity which ought to be so universally desired.

The Court took the following order on the postponement of the trial.

AARON BURR, late of the city of New-York, and state of New-York, attorney at law, who stands indicted for treason, was this day brought to the bar in custody of the Marshal of this district, and thereof arraigned and pleaded not guilty to the indictment, and for his trial put himself upon God and the country: whereupon he is remanded to jail. And whereas the trial of the said Aaron Burr cannot be had in the county of Wood, where the offence is alleged to have been committed, without great inconvenience—It is ordered, that a *Venire Facias* issue, to the Marshal of this district to be directed, commanding him to summon forty-eight persons qualified as the law directs: twelve of whom, from the said county of Wood, to appear here on the third day of August next, as a *Venire* for the trial of the said Burr.

MONDAY, June 29.

Mr. HAY laid the following order of the Executive Council before the Court.

IN COUNCIL, *June* 29, 1807.

The Board being informed that an affidavit has been filed in the Circuit Court of the United States, for the Virginia district, which states that the jail for the county of Henrico and city of Richmond is inconvenient and unhealthy, and so crouded with State offenders and debtors, that there are no private apartments therein, for the reception of persons charged with offences against the laws of the United States: It is therefore advised, that the Governor be requested to tender the said Court, (through the Federal Attorney of the district of Virginia,) apartments in the third story of the public jail and penitentiary house, for the reception of such persons

as shall be directed under the authority of the United States to be confined therein.

Extract from the Minutes.

DANL. L HYLTON, *Clerk of the Council.*

The following was the order of Court on this subject:

" Which tender the Court doth accept, for the purpose above mentioned."

The final decision of the motion to commit Aaron Burr to the penitentiary was postponed till to-morrow.

TUESDAY, June 30.

The motion to commit Aaron Burr to the penitentiary was renewed.

It was objected to by his Counsel on the ground—(and an affidavit was made by them to the same effect,) that in so important a case, it was essentially necessary for the most uninterrupted intercourse to subsist between the prisoner and his Counsel; but that the distance of the penitentiary, combined with their own personal avocations, would necessarily narrow and interrupt this intercourse. It was also said, that by particular regulations of the penitentiary, the custody of the prisoner would be transferred from the Marshal to the Superintendant; and that the communications of the prisoner with his Counsel would be limited to the very same short period which was allowed to the other visitants; that is, from 11 to 1 o'clock.

The Attorney for the United States repelled these objections.

The CHIEF JUSTICE said, that when there was a public jail, not unreasonably distant or unfit for the reception of the prisoner, and when the Court was called upon, on the part of the United States, to commit a prisoner to its keeping, that he conceived himself bound to comply with the requisition: that when he had given the order for his removal from the jail to his own lodgings, it was under an expectation that the trial would be prosecuted immediately, and the intercourse between the prisoner and his Counsel would be necessarily incessant; but as a postponement had taken place, such an intercourse would not be absolutely nesessary: Under such circumstances, therefore, he should direct the removal of the prisoner to the penitentiary, *if* he was still to continue in the possession of the Marshal, and if his Counsel were to have a free and uninterrupted access to him.

Some difficulty having thus occurred on these points, the Executive Council were immediately convened. In a short time the following letter was submitted to the Court.

COUNCIL CHAMBER, *June 30.*

SIR,

In pursuance of an advice of the Council of State, I beg leave through you to inform the Circuit Court of the United States now

sitting, that any persons who may be confined in the jail and penitentiary house on the part of the United States, will be considered as in the custody, and under the sole controul of the Marshal of the district—that he will have authority to admit any person or persons to visit the confined that he may think proper; and that he will be authorised to select for the purposes aforesaid, any apartment in the penitentiary, now unoccupied, that he may deem most conducive to safety, health, and convenience.

I am, with great respect, Sir,

Your obedient servant,

WM. H. CABELL.

George Hay, Esq.

The Court then came to the following order:

In consequence of the offer made by the Executive, of apartments in the third story of the penitentiary and State prison, for persons who may be confined therein under the authority of the United States, and of the foregoing letter from the Governor of this commonwealth, it is *ordered*, on motion of the Attorney for the United States, that as soon as the apartments in the second story of the public jail and penitentiary shall be fit for the reception and safe-keeping of Aaron Burr, he be removed thereto, and safely kept therein by the Marshal, until the second day of August next, when he shall be brought back to the prison where he is now placed: there to be guarded in like manner as at present, until the further order of the Court.

THE PUBLISHERS

Intended, when they first commenced this Report, to have given it to the public in volumes of 150 pages: but, on account of its extreme length, exceeding all possible calculation, and the wish of but few of their subscribers to receive it in that form, they have blended the two parts of the preliminary proceedings in this one volume. The trial in chief will be published in such divisions as shall be found most convenient, and a complete index of the whole work subjoined at the end. They hope that a liberal public will pardon this deviation from their first proposition, (the price per page not being enhanced to the purchaser, and much more convenient), as well as the unavoidable delay that has taken place in its publication. They are determined, however, to persevere in endeavouring to give to the world a completely impartial report of this trial, and make it worthy of public patronage.

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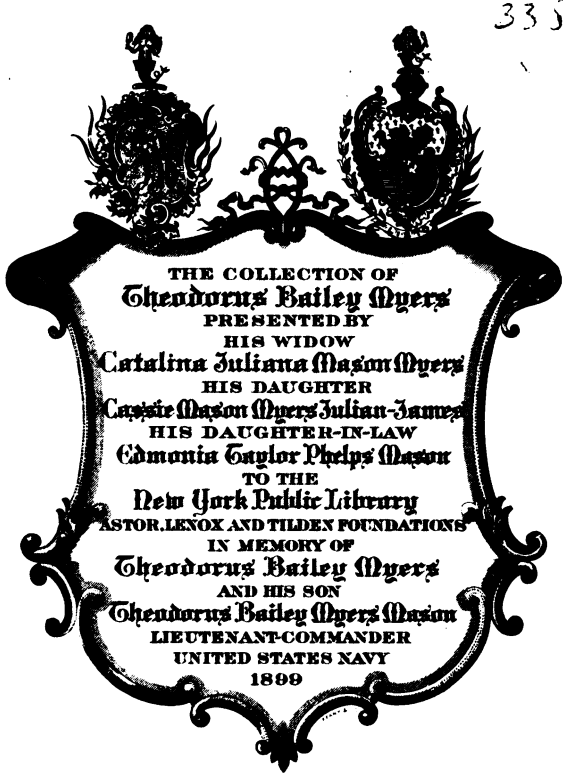
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Theodorus Bailey Myers
PRESENTED BY
HIS WIDOW
Catalina Juliana Mason Myers
HIS DAUGHTER
Cassie Mason Myers Julian-James
HIS DAUGHTER-IN-LAW
Edmonia Taylor Phelps Mason
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AND HIS SON
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LIEUTENANT-COMMANDER
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